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Terrorism and human rights

**Progress report prepared by Ms. Kalliopi K. Koufa,
Special Rapporteur**

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Introduction

1. In its resolution 1996/20 of 29 August 1996, adopted without a vote, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to entrust Ms. Kalliopi K. Koufa with the task of preparing, without financial implications, a working paper on the question of terrorism and human rights, to be considered at its forty-ninth session.

2. In its resolution 1997/42 of 11 April 1997 entitled "Human rights and terrorism", the Commission on Human Rights, noting the decision of the Sub-Commission to have a working paper prepared on the question of human rights and terrorism, reiterated its unequivocal condemnation of all acts, methods and practices of terrorism, regardless of their motivation, in all its forms and manifestations, wherever and by whomever committed, as acts of aggression aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for the economic and social development of States, and decided to continue consideration of the question at its fifty-fourth session as a matter of priority.

3. At the forty-ninth session of the Sub-Commission, Ms. Koufa submitted a working paper (E/CN.4/Sub.2/1997/28), identifying the diverse issues and problems involved in the discussion of this question and containing a number of proposals for a study on terrorism and human rights. After examining the working paper, the Sub-Commission adopted resolution 1997/39 on 28 August 1997, in which it expressed its deep appreciation to Ms. Koufa for her analytical, very comprehensive and well-documented paper, and recommended that the Commission on Human Rights authorize her appointment as Special Rapporteur to conduct a comprehensive study on terrorism and human rights on the basis of her working paper.

4. At its fifty-fourth session, the Commission on Human Rights, in its decision 1998/107 of 17 April 1998, approved the appointment of Ms. Koufa as Special Rapporteur and requested the Secretary-General to provide the Special Rapporteur with all the assistance necessary to enable her to accomplish her task. The Economic and Social Council, in its decision 1998/278 of 30 July 1998, endorsed decision 1998/107 of the Commission on Human Rights.

5. Owing to the insufficient time between the confirmation of her appointment by the Commission and the deadline for submitting Sub-Commission documents, the Special Rapporteur was unable to prepare a preliminary report for the fiftieth session of the Sub-Commission. However, she made an oral presentation at that session, in which she highlighted the essential elements of her study, and discussed her ideas on the purpose, scope, sources and structure of a preliminary report. After expressing its interest in the study on human rights and terrorism and in the oral statement by the Special Rapporteur concerning the basis and the orientation of the study, the Sub-Commission adopted resolution 1998/29 on 26 August 1998, in which it requested the Special Rapporteur to submit her preliminary report at its fifty-first session.

6. At its fifty-first session, the Sub-Commission examined the preliminary report submitted by the Special Rapporteur (E/CN.4/Sub.2/1999/27), containing the historical background of the study and an analysis of the major areas in which terrorism puts under threat the social and political values that relate, directly or indirectly, to the full enjoyment of human rights and fundamental freedoms, as well as an identification of priority areas and questions most deserving of examination in the next phases of the study and an indication of the methods to be used to complement the essential research. In resolution 1999/26 of 26 August 1999, the Sub-Commission expressed its deep appreciation and thanks to the Special Rapporteur for her excellent and comprehensive preliminary report and requested the Secretary-General to transmit this report to Governments, specialized agencies and concerned intergovernmental and non-governmental organizations with the request that they submit to the Special Rapporteur as soon as possible comments, information and data relating to the study on terrorism and human rights.

7. In the same resolution the Sub-Commission requested the Secretary-General to give the Special Rapporteur all the assistance necessary for the preparation of her progress report, in particular by providing for visits of the Special Rapporteur to Geneva, New York and the United Nations Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention in Vienna, in order to hold consultations with the competent services and bodies of the United Nations, to complement her essential research and to collect all the needed and up-to-date information and data. The Sub-Commission recommended that the Commission on Human Rights approve this request to the Secretary-General.

8. At its fifty-fourth session, the Commission on Human Rights, in its resolution 2000/30 of 20 April 2000, taking note of Sub-Commission resolution 1999/26, requested the Secretary-General to continue to collect information, including a compilation of studies and publications, on the implications of terrorism, as well as the effects of the fight against terrorism, on the full enjoyment of human rights from all relevant sources, and to make it available to the concerned special rapporteurs, including the Special Rapporteur on human rights and terrorism of the Sub-Commission. The Commission endorsed the Sub-Commission's request to the Secretary-General to give the Special Rapporteur all the assistance necessary, in order to hold consultations with the competent services and bodies of the United Nations system to complement her essential research and to collect all the needed and up-to-date information and data for the preparation of her progress report. The Economic and Social Council, in its decision 2000/260 of 28 July 2000, approved this request to the Secretary-General.

9. The Secretariat, in a note to the Sub-Commission at its fifty-second session (E/CN.4/Sub.2/2000/31), set out the technical reasons for the inability of the Special Rapporteur to finalize her progress report within the time available for the preparation of documents for that session. In an oral statement explaining the substantive and procedural reasons and delays that had made the submission of her progress report at the fifty-second session impossible, the Special Rapporteur requested that the Sub-Commission allow her to submit her progress report at its fifty-third session. The Sub-Commission, in its decision 2000/115 of 18 August 2000, requested the Special Rapporteur to submit the progress report on her study at its fifty-third session.

10. The Special Rapporteur has proceeded with the preparation of this progress report on terrorism and human rights from the bases laid down in the working paper (E/CN.4/Sub.2/1997/28) and the preliminary report (E/CN.4/Sub.2/1999/27). Therefore, the present report should be studied with the aforementioned documents in mind. The report will not revert to the analysis of the relationship of terrorism to human rights and its broader international implications as discussed in the preliminary report. Its main purpose is to move ahead and explore other priority areas touched upon in the earlier documents prepared by the Special Rapporteur, namely the problem of definition and of the actors involved in the exercise or use of "terrorist" activity, the development of new forms of terrorism and the probability of mass destruction terrorism and, finally, a number of issues associated with the consequences of terrorism for human rights. It also attempts to provide an update on recent international action on terrorism and to give attention to issues raised by the Commission on Human Rights in its resolutions 1999/27 of 26 April 1999, 2000/30 of 20 April 2000 and 2001/37 of 23 April 2001.

11. Accordingly, the present progress report is divided into five chapters. Chapter one provides information on the development of international action on terrorism since the preliminary report was issued. Chapter two addresses problems regarding the definition of terrorism and focuses in particular on the actors or potential perpetrators of terrorism, as well as on the necessity to distinguish terrorism from armed conflict. Chapter three explores the threat of mass destruction terrorism and the wide-ranging debate that is currently carried on concerning contemporary forms of terrorism. Chapter four is devoted to the impact of terrorism on human rights and to the Commission's requests that the Special Rapporteur give attention to the questions presented in its resolutions 1999/27, 2000/30 and 2000/31. Concluding observations can be found in chapter five.

12. The mode of analysis of the subject matter at hand follows the perspective of international law, including the law of human rights, international humanitarian and criminal law, but not only that. Terrorism is a distinctive form of criminal activity in that it encompasses elements of politics and conflict. The Special Rapporteur initiated the necessary direct contacts with the Office of Legal Affairs of the United Nations in New York and the Terrorism Prevention Branch of the United Nations Office for Drug Control and Crime Prevention, based in Vienna. The documents which have so far been made available to the Special Rapporteur suggest that further analysis and consultation with these focal points that address the international phenomenon of terrorism from different perspectives would be extremely useful. Given the complexity and diversity of questions to be considered in the framework of the study on terrorism and human rights, it also seems necessary that a second progress report be prepared for consideration by the Sub-Commission. A recommendation to this effect is included at the end of the report.

I. AN UPDATE ON INTERNATIONAL ACTION

13. Since the submission of the working paper and the preliminary report there has been recent additional international action on terrorism that should be taken into account.[1]

14. On 19 October 1999, the Security Council voted unanimously to wage a common fight against terrorists anywhere. In its historic resolution 1269 (1999) - its first resolution ever to address the matter of terrorism in general[2] - the Security Council, emphasizing the necessity to

intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter and norms of international law, including respect for international humanitarian law and human rights, stressed the vital role of the United Nations in strengthening international cooperation in combating terrorism and emphasized the importance of enhanced coordination among States, international and regional organizations. It also called upon States to take appropriate steps to deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition, and to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts.

15. The General Assembly, in its resolution 54/109 of 9 December 1999, adopted the International Convention for the Suppression of the Financing of Terrorism, the full text of which is set out in the annex to that resolution. In its resolution 54 /110 of 9 December 1999 entitled "Measures to eliminate international terrorism", the General Assembly decided that the Ad Hoc Committee established by its resolution 51/210 of 17 December 1996[3] should continue to elaborate a draft international convention for the suppression of acts of nuclear terrorism, should address means of further developing a comprehensive legal framework of conventions dealing with international terrorism, including considering the elaboration of a comprehensive convention on international terrorism, and should address the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations. The Ad Hoc Committee met from 14 to 18 February 2000 and discussed all three items.[4] Its report reflects a serious divergence of views regarding both the nuclear terrorism draft and the high-level conference.[5] There was recognition that the question of the elaboration of a comprehensive convention on international terrorism was not then before the Ad Hoc Committee but that completion of work on the other two items would facilitate work on such a convention.[6]

16. In his report on human rights and terrorism to the General Assembly at its fifty-fourth session (A/54/439 of 6 October 1999), the Secretary-General set out, in summary fashion, the content of the replies received from a number of Governments on the implications of terrorism, in all its forms and manifestations, for the full enjoyment of all human rights and fundamental freedoms, pursuant to General Assembly resolution 52/133 of 12 December 1997.

17. In its resolution 54/164 of 17 December 1999 entitled "Human rights and terrorism", the General Assembly condemned the violations of the right to live free from fear and of the right to life, liberty and security, as well as the incitement of ethnic hatred, violence and terrorism. It reiterated its unequivocal condemnation of the acts, methods and practices of terrorism as activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences for economic and social development. It also urged the international community to enhance cooperation at the regional and international levels in the fight against terrorism, in accordance with relevant international instruments, including those relating to human rights.

18. The Secretary-General, in his most recent report, entitled "Measures to eliminate international terrorism" (A/55/179 of 26 July 2000 and A/55/179/Add.1 of 9 October 2000), sets out additional information received from Governments and international organizations in the light of General Assembly resolution 49/60 of 9 December 1994, a list of the existing 19 international conventions (global and regional) pertaining to international terrorism,[7] and progress in the preparation of a compendium on national laws and regulations relating to the prevention and suppression of international terrorism. The report aiso has a chart indicating accession to or ratification by States of the 19 conventions.

19. On 8 September 2000, in its resolution 55/2, the General Assembly adopted the United Nations Millennium Declaration, which, in paragraph 9, includes the pledge to take "concerted action against international terrorism, and to accede ... to all the relevant international conventions". On 12 December 2000, the General Assembly adopted resolution 55/158, entitled "Measures to eliminate international terrorism", in which it decided that its Ad Hoc Committee on international terrorism should continue to elaborate a comprehensive convention on international terrorism and should continue its efforts to resolve the outstanding issues relating to the elaboration of a draft international convention for the suppression of acts of nuclear terrorism, and that it should keep on its agenda the question of convening a high-level conference on terrorism. The Ad Hoc Committee met from 12 to 23 February 2001 and continued its work on the above-mentioned items, building upon the work accomplished during the fifty-fifth session of the General Assembly within the framework of a working group of the Sixth Committee.[8]

20. On 16 March 2000, the European Parliament made mention of terrorism in its resolution on respect for human rights in the European Union.[9] This resolution "[r]eiterates that terrorism is a violation of human rights" and underlines the importance of cooperation between States in combating it and the need for appropriate indemnity for victims of terrorism "in conformity with the guidelines of the Commission communication on crime victims in the European Union".[10]

21. In April 2000, the Thirteenth Ministerial Conference of the Movement of Non-Aligned Countries reiterated its position on terrorism and reaffirmed its 1998 initiative calling for an international summit conference under the auspices of the United Nations.[11]

22. The Organization of the Islamic Conference (OIC) has also addressed terrorism. At its twenty-sixth session, held at Ouagadougou, Burkina Faso, from 28 June to 1 July 1999, the Islamic Conference of Foreign Ministers adopted the Convention of the Organization of the Islamic Conference on Combating International Terrorism.[12] At its Ninth Summit Conference (Qatar, 2000) the OIC reiterated its support for a high-level international conference on terrorism and again stressed the OIC concerns about the need to distinguish clearly terrorism from people's struggle for "national liberation ... and the elimination of foreign occupation and colonial hegemony as well as for regaining the right to self determination".[13] In its resolution No. 65/9 - P(IS), the Ninth Summit endorsed the OIC Convention for Combating International Terrorism and in its resolution No. 64/9 - P(IS) reiterated its support for convening an international conference under the auspices of the United Nations to define terrorism.

23. Finally, the Organization of African Unity (OAU) adopted the OAU Convention on the Prevention and Combating of Terrorism during the 35th Ordinary Session of the Assembly of Heads of State and Government, in July 1999, in Algiers, whereas a Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism was signed at Minsk on 4 June 1999.

II. THE PROBLEM OF DEFINITION

A. The controversy before the Sub-Commission

24. As indicated in her working paper and in her preliminary report, the Special Rapporteur considers the issue of terrorism to be one of the most controversial issues in the contemporary international legal and political arena. This has been apparent since 1937, when concerted international effort to promulgate the International Convention for the Prevention and Punishment of Terrorism, adopted under the auspices of the League of Nations, failed. Since the failed 1937 effort, the international community has addressed terrorism only in a piecemeal fashion (i.e. crime by crime/issue by issue) rather than comprehensively. The controversial issue of terrorism has thus been approached from such different perspectives and in such different contexts that it has been impossible for the international community to arrive at a generally acceptable definition to this very day.[14] Instead, there exists a plethora of definitions and working definitions advanced by scholars and practitioners,[15] which tend to be either too expansive and broad, so as not to omit any possible interpretation of the phenomenon, or more restricted and narrow, focusing eventually on particular terrorist acts and excluding wide-ranging interpretations.

25. Indeed, it may be that the definitional problem is the major factor in the controversy regarding terrorism. This is all the more true when considering the high political stakes attendant upon the task of definition. For the term terrorism is emotive and highly loaded politically.[16] It is habitually accompanied by an implicit negative judgement and is used selectively. In this connection, some writers have aptly underlined a tendency amongst commentators in the field to mix definitions with value judgements and either qualify as terrorism violent activity or behaviour which they are opposed to or, conversely, reject the use of the term when it relates to activities and situations which they approve of.[17] Hence the famous phrase "one man's terrorist is another man's freedom fighter".

26. Because of these problems, the Special Rapporteur has pointed out that in view of the complexity and amplitude of the human rights dimensions of terrorism it would be premature and counterproductive to proceed with a definition before the Sub-Commission determines which issues it considers worth developing,[18] and that finding an all-encompassing and generally acceptable definition of terrorism is too ambitious an aim.[19] However, she had also indicated her leaning towards the view that, in future reports, she may have to explore some working definitions, in order to delimit the subject matter with greater precision and, in particular, with a view to identifying its major aspects and possible relationship to the question of accountability.[20]

27. It is important to note at this point that the views of the Sub-Commission members are divided as to whether the study should undertake a definition of terrorism. A review of the discussions held at the forty-ninth and fifty-first sessions of the Sub-Commission testifies that

the following positions were taken by the expert members on this issue. While Mr. A. Khalil maintained that any attempt to formulate a definition of terrorism might well prove elusive and unrewarding at the present stage,[21] and Mr. F. Yimer agreed with the Special Rapporteur that it would be premature and counterproductive to proceed with a definition until the Sub-Commission determined which issues it considered worth developing,[22] Mr. L. Joinet pointed out that it was better not to define terrorism.[23] Mr. E.H. Guissé considered that before any generally acceptable definition could be arrived at deeper study and extensive discussion would be required and that it was possible that such a definition was unattainable.[24] Mr. H. Fix Zamudio expressed his conviction that it would be possible, albeit difficult, to find a concept of terrorism that could be used as a working hypothesis, as had happened in the case of the concepts of indigenous populations and minorities,[25] and Mr. M. Bossuyt expressed the hope that the Special Rapporteur would succeed in arriving at a definition that would at least find acceptance in the Sub-Commission.[26]

28. It should also be noted that the views of the Sub-Commission members vary also in relation to some of the key areas or key elements of contention regarding definition, such as the actors involved in terrorism (Who is using terrorism? Or, who can be identified as engaging in the exercise of terrorism?) and the nature of the acts (What instances of crime or pattern of acts can be qualified as terrorism?). In this connection, it will be recalled that during the discussions in the Sub-Commission, some expert members associated the problem of defining international terrorism with the controversy about the actors involved in it, whether State or non-State entities, while others emphasized the objective elements of the crime and would rather concentrate on an enumeration of acts that could be considered terrorist.

29. Thus, for instance, some members argued for the need to address State terrorism[27] or terrorism promoted or tolerated by States and terrorism emanating from irregular armed groups and other groups and organizations.[28] It was also pointed out that the study should attempt to define the different forms of terrorism[29] and distinguish between acts of terrorism according to who was responsible for them, whether States or groups and States.[30] Other members indicated that there existed already criteria for the definition of terrorist acts,[31] that characterizing as criminal certain types of conduct, or drawing up a list of serious crimes defined by objective elements of the crime and possibly the nature and extent of the direct effects, was what was needed,[32] and that specific instances of terrorism should be considered,[33] while one member pointed out with regard to definition that an analytical exploration was needed, which should encompass not only the act (its nature and pattern) but also the actor (government-linked elements and non-State actors operating inside and outside the country), as well as the target of terrorism.[34]

30. It has been and remains the position of the Special Rapporteur that the study does not need to make use of a precise and/or generally accepted definition of terrorism and that, in any case, a definition should not yet be used. However, the study does not need to shy away from the conceptual analysis of terrorism or from scrutinizing its essential elements and manifestations, with a view to obtaining and drawing together basic definitional components and criteria that could eventually guide the Sub-Commission towards the advancement or articulation of a definition of terrorism, for the purposes of the study, before the study is completed.

31. Since this is a progress report, it is at this time more important to continue discussing questions in order to induce more comments from Sub-Commission members, observers and non-governmental organizations, rather than pursue final answers. In this respect, the Special Rapporteur also accepts the suggestion, already made some time ago, by another Sub-Commission expert who, noting the differing interpretations within the Sub-Commission, said that the Sub-Commission's task would be "to prune away and to discuss, so that opinions could coalesce".[35]

B. The question of the actors involved in the exercise of terror or terrorism

1. Introduction

32. One of the major reasons for the failure to come to a generally acceptable definition of terrorism is that different users of definition concentrate almost entirely on behavioural description (i.e. on certain conduct or behaviour and its effects) and do not spell out clearly who can use terrorism. Yet, the term "terrorism" carries almost always the flavour of some (subjective) moral judgement: some classes of political violence are justified whereas others are not. The same type of conduct or behaviour will or will not be viewed as terrorism by a particular observer according to the moral meaning or justification ascribed to it. Thus, the labelling of a particular act as "terrorist" may be more a formulation of a social judgement than a description of a set of phenomena.[36] As a consequence, a descriptive (objective) definition of terrorism which focuses on certain behaviour and its effects, and does not allow consideration of the identity of the author or perpetrator, may be useful but not absolutely precise or satisfactory in containing and explaining a relativist concept, tempered by considerations of motive and politics, such as terrorism.

33. The above observations are illustrated well by the very practice within the United Nations, where among the main stumbling blocks in the effort to define terrorism has been the question of who can be identified and labelled as "terrorist". In fact, review of action undertaken by the General Assembly and the Commission, as well as records of the discussions held in the framework of these organs, and of the various ad hoc committees on terrorism established by the General Assembly,[37] as this issue has progressed, reveal that a certain degree of consensus has been obtained on some of the elements of conduct that comprise terrorism, but not on who can use terrorism, or - to put it otherwise - on who can be a potential author of terrorism.

34. Thus, in considering alternative approaches to definition, it may be valuable not to start by seeking to determine at present what conduct or acts should be included under the concept of terrorism but by attempting to approach the concept of terrorism by reference to the authors or instigators in situations that are commonly perceived and interpreted (or characterized) in both academic discussion and ordinary parlance as "terrorism". This approach has the advantage of seeking to lessen the controversy or, at least, make it more manageable by spelling it out clearly and trying to explain it.

35. This approach involves examination of the basic distinction made between State terrorism and sub-State or individual terrorism and understanding of the multifold manifestations of both State and sub-State or individual terrorism. The distinction and categorization of the

above types of terrorism are, in the opinion of the Special Rapporteur, not only important and relevant to the present study but also the proper basis to ask for guidance on whether, eventually, it will be desirable, for the purposes of the study, to exclude any category or form of terrorism. Such guidance will, in turn, help the Special Rapporteur in delimiting more precisely the scope of the study as to the acts and the targets of terrorism.

2. State and sub-State (or individual) terrorism

36. In considering the concept of terrorism by reference to potential actors or instigators in a situation recognized in both academic discussion and common parlance as terror or terrorism, there is a foremost distinction to be made between State terrorism (i.e. terrorism used by the State) and sub-State (or individual) terrorism (i.e. terrorism exercised "from below",[38] or against the State). This foremost distinction between State and sub-State (or individual) terrorism is now a generally acceptable component of the debate on terrorism, despite the fact that some commentators prefer to focus attention on State terrorism and others on sub-State (or individual) terrorism. This distinction is, moreover, useful in that it covers not only the historical genesis of modern terrorism[39] and the evolutionary alteration that its ordinary meaning has undergone since it first came into use,[40] but also current concepts of international terrorism, as will be seen in greater detail below.[41]

37. Indeed, the concept of State terrorism or terror of State originated from the "régime de la terreur" which evolved between 1792 and 1794, during the French Revolution, wherein terror-violence was used intentionally and systematically by the revolutionary government as an instrument of political repression and social control. Confronted with external and internal crises (i.e. the threat of foreign invasion, civil war, economic hardship, counterrevolution and the possibility of a complete breakdown of State authority) the French Government under Robespierre responded by creating machinery and legislation that made the (Jacobin) "terror" possible, i.e. a ruthless policy directed against suspected enemies that consisted of arrests, imprisonments, confiscations of property, torture and executions, and the spreading of intimidation and fear in order to consolidate State authority.[42]

38. The concept of sub-State (or individual) terrorism emerged almost a century later, between 1878 and 1881, and evolved with the passage of time as part of the terrorist process, first in tsarist Russia, and then across Europe and in the United States. The concept embraced the anti-State terror tactics of individuals and groups inspired and affected by the anarchist ideology and philosophy that rejected the State, all government-made laws and private property. Acts of violence and intimidation (such as assassinations - targeting in particular heads of State, ministers or other government officials and prominent political or business personalities - bombings, sabotage and robberies) by individuals and groups who tried to enforce their political ideas by terrorizing the State and the public, in order to revolutionize the masses and bring about social and political change, generated considerable attention and eventually became a prominent feature of life in many countries.[43]

39. Both the concept of State terrorism and the concept of sub-State (or individual) terrorism significantly expanded and evolved in the course of the twentieth century, as social and technological changes manifestly affected terrorist operations and tactics, and their effectiveness, as well as terrorist philosophy.[44]

40. In particular, the spread of ideological violence and the fragmentation or dismantling of existing socio-political structures, on the one hand, and the advances in the fields of transport, communications and weaponry, on the other hand, facilitated the emergence of transnational and international terrorism. Increased mobility, cooperation and links not only between non-State terrorist actors from divergent political, ethnic and geographical backgrounds but also between State and non-State terrorist actors appeared, and the manifestations of both State and sub-State (or individual) terrorism multiplied and changed. Furthermore, the dividing line between terrorism and criminality gradually became less and less distinct and the targets of terrorism less and less concrete.

41. However, despite the ever expanding and evolving behavioural and stylistic variables which have come to characterize terrorism in our days, the dual conceptual distinction between State and sub-State (or individual) terrorism retains all its validity and utility for purposes of analysis, and to help illuminate and understand the two different - i.e. State and anti-State - basic dimensions of the phenomenon of terrorism. After all, it is obvious that almost all modern variants of terrorism trace their immediate antecedents to these two different expressions or dimensions of the phenomenon.

3. Manifestations of State terrorism

(a) Regime or government terror

42. There are different manifestations of terrorism used by the State. In the first place, there is the so-called "regime" or "government" terror, i.e. the traditional type or form of State terrorism, which is conducted by the organs of the State against its own population or the population of an occupied territory, in order to preserve a given regime or suppress challenges to its authority. [45] The most widely known historical examples of this type of State terrorism include the "reign of terror" in France under Robespierre, mentioned already, [46] the atrocities of the Stalinist regime in the Soviet Union between 1929 and 1946, [47] and the State terror of Hitler's Nazi Germany culminating in the genocide of the Jews and Gypsies and the mass slaughter of Slavic people between 1933 and 1945. [48] More recent examples include the reign of terror, from 1971 to 1979 of Idi Amin Dada, Ugandan President for Life [49] Pol Pot's reign of terror in Cambodia from 1975 to 1979, [50] and the notorious "dirty war" against "subversive elements" and the treatment of the "disappeared" by Argentina's military junta between 1976 and 1983. [51]

43. State terrorism in the form of "regime" or "government terror" is characterized by such actions as the kidnapping and assassination of political opponents of the government by the police or the secret service or security forces or the army; systems of imprisonment without trial; persecution and torture; massacres of racial or religious minorities or of certain social classes; incarceration of citizens in concentration camps; and, generally speaking, government by fear. It is quite obvious that almost all dictators and dictatorial or totalitarian and militarist regimes, as well as old-fashioned autocracies, have resorted to this form of State terrorism, which is, in essence, a misuse and an abuse of the powers of government, whether in the domestic or the occupied territory setting.

44. It is equally obvious that this form of State terrorism can also be deployed by a democratic government in a situation of "emergency", internal strife or civil war, in which overreactions to the dangers of terrorism and a cult of counter-terrorism tactics could result in the deprivation of individual freedom, the increase of potential government violations of human rights and, generally speaking, "terror from above", [52] with no one left to protect the public from intimidation and repression.

45. State terrorism in the context of "regime" or "government terror" is, then, a global phenomenon confined to no particular ideology or location. Even when trying to operate secretly, this type of bureaucratized terror intimidates, injures and abuses whole groups, sometimes whole nations, and it is the type of terrorism that historically and today produces the most harm. [53]

46. A further point that deserves particular mention is the role of the law in the reification and legitimacy of "regime" or "government terror". In fact, "regime" or "government terror" is exercised according to the law that the public authorities have themselves created. To put it differently, the organization and administration of terror-violence and coercion by the State against its population, a segment thereof or the population of an occupied territory usually involves its national or domestic law. It follows that official regimes which practise terrorism assert the legality of their activities drawing on well-recognized claims of legitimacy based upon national or domestic law. However, it is with regard to the very same law that the difficult question of the legitimacy of power and of resistance to oppression inevitably arises. [54] Hence the familiar terrorist cycle of action and reaction that permits each side to regard itself as the wronged party; in other words, the cycle of State and anti-State terrorism. [55]

47. It will also be noted that the use of terror by a State against its own population does not generally fit within the scope of "international" terrorism. [56] As a consequence, it does not prima facie come into the ambit of international law. Nonetheless, it is all too well known that, with the involvement of the United Nations in human rights matters constantly expanding and deepening, the treatment by a State of its own nationals is now viewed in the context of international human rights regulations. The principle of domestic jurisdiction as mirrored in article 2, paragraph 7, of the Charter[57] having increasingly eroded, as humanitarian concerns prevail over respect for a State's right to manage or mismanage its affairs, human rights issues are no longer recognized as being solely within the domestic jurisdiction of States. Accordingly, the basic duty of non-intervention in the domestic affairs of States has been subject to a process of reinterpretation in the human rights field since 1945, so that States can no longer plead it successfully as a bar to international concern and consideration of internal human rights situations.[58]

48. This evolutionary development has been further accelerated by the multiplication of the State's human rights obligations through the expansion not only of international human rights law but also of international humanitarian and criminal law. Thus, for instance, in the area of human rights, a wide-ranging series of international and regional instruments dealing with the establishment of standards and norms have limited the State's freedom of action and given birth to an ever expanding institutional framework of mechanisms for dealing with human rights violations. [59] Treaty provisions such as the prohibition of torture, genocide, slavery and the

principle of non-discrimination may now be regarded as having entered into the category of customary international law in the light of international practice, while other human rights provisions established under treaty may constitute obligations erga omnes for States parties.[60]

49. In situations of armed conflict, international law, by virtue of customary and humanitarian law, condemns State terror perpetrated in violation of the applicable provisions of the Geneva Conventions of 12 August 1949, relating to the protection of victims of armed conflicts, and of their two Additional Protocols of 8 June 1977. This is notably the case in the event of disregard for the rules of international humanitarian law protecting civilians, as well as the wounded and prisoners of war.[61]

50. From this perspective, it has been pertinently argued that State or government terror that is carried out in peacetime essentially raises human rights problems, whereas during wartime it involves problems relating to humanitarian law.[62] Nonetheless, it has also been convincingly maintained that the fundamental principles of international law recognized in the Charter of the Nürnberg Tribunal (the "Nürnberg Principles") should also be taken into consideration, since they too deal with terrorist acts in times of peace and of war.[63] In this respect, it is instructive to consider also the jurisprudence of the more recent international criminal tribunals for the former Yugoslavia and for Rwanda.[64]

(b) State-sponsored terrorism

51. Central to the deliberation of the important international dimensions of terrorism is the marked increase in the involvement of States in terrorism in pursuance of their immediate foreign policy goals. Thus, in recent years, a wider view of the concept of State terrorism has been taken in both the policy and the scholarly communities, a view that expands the scope of State terrorism to include any form of overt or covert support or assistance given by a State to terrorist agents for the purpose of subverting or destabilizing another State or its government.

52. State-sponsored terrorism occurs when a government plans, aids, directs and controls terrorist operations in another country. The activities may be carried out by individuals or by government officials.[65] As suggested by its very name, "State-sponsored terrorism" generally involves terrorist activities against one State which are "sponsored" by another State.[66] The sponsoring State benefits by distancing itself from the terrorist activity, since it can easily deny any involvement. The support of guerrilla insurgents in Mozambique and Angola by the Government of South Africa in the 1980s is a classic example.[67] Weaker States, however, have also employed the technique of sponsorship as a useful method of striking out at opponents who outgun them in terms of military strength.[68]

53. State-sponsorship of terrorism may take many forms ranging from moral and diplomatic encouragement to the supply of material assistance, such as arms and other equipment, training, funds and sanctuary to terrorists directly or indirectly controlled by the sponsoring State. For States targeted by State-sponsored terrorism, it can often be difficult to find the link that ties terrorists to their sponsors, and thus to bring the sponsoring State to be held responsible. As noted by a prominent commentator, this type of terrorism is characterized by "an almost impenetrable maze of linkages, intrigues, common and conflicting interests, including open and covert collaboration with foreign governments who preferred to stay in the shadows".[69]

54. The fact that State-sponsored terrorism encompasses such a variety of behaviours has led some commentators to further distinguish between "State sponsorship" and "State support" of terrorism, the latter implying a lesser degree of State involvement and control of the terrorists. Thus, according to this distinction, "State sponsorship" would refer to those situations where the State actively contributes to the planning, direction and control of terrorist operations, whereas "State support" would include situations such as tacit support, provision of transportation, permission for use of territory and financial support for terrorists.[70] As can be readily appreciated, however, the line between "State sponsorship" and "State support" of terrorism can be blurred in the practice of States. Moreover, because of the lack of precise legal content of these terms, there is major disagreement over what constitutes State sponsorship, support of, or involvement in international terrorism, what strategic, domestic or foreign policy goals are intended to be pursued by it, which States are involved in sponsoring or influencing terrorist groups, and how to evaluate the alleged evidence of State involvement.[71]

55. It should further be noted that State-sponsored terrorism is not a novel phenomenon nor a unique feature of the contemporary international landscape. It was an established practice in ancient times in the Oriental empires, in Rome and Byzantium, in Asia and Europe, and there are countless examples of it in modern history.[72] For instance, in the late nineteenth century, Russia provided support to revolutionary groups in the Balkans trying to set up Slavic States. During the First World War, Germany supplied arms to the Irish nationalists fighting British rule. In the twentieth century, numerous States have backed terrorist groups.[73] Nonetheless, it is only since the mid-1970s that this form of State terrorism has received increased international attention, when United States analysts first classed it as "surrogate warfare" and suggested that such sponsorship was a coherent programme undertaken by various Communist bloc and Arab States.[74]

56. Admittedly, there has been growing recognition among experts in the field that in an age of nuclear strategy and sophisticated technological means, State-sponsored terrorism, along with other forms of unconventional and "indirect warfare",[75] constitutes a particularly attractive mode of low-intensity warfare, allowing a State to strike at its enemies in a way that is easily deniable, clandestine, relatively cheap, high yielding and less risky militarily than conventional armed conflict.[76]

57. In the words of a specialist on terrorism, "State involvement that takes the form of sponsorship of terrorism may constitute the waging of secret or undeclared warfare against an adversary State ... [B]ecause of the dangers of military escalation in today's world of high technology, this form of so-called low-intensity conflict is becoming increasingly prevalent".[77] Other specialists, however, have warned against the labelling of terrorism as warfare and, in particular, against the categorization of State-sponsored terrorism as low-intensity warfare, or as "surrogate warfare" in the eventual interests of States at yet a further remove, arguing that such categorization confuses the essential nature of State-sponsored terrorism, which does not constitute a unitary phenomenon and a single type of conflict.[78] In the same line of argument, it has been convincingly maintained that equating State-sponsored terrorism with low-intensity warfare leads to military analyses and military solutions and, thence, to accompanying excessive use of force and interventionism, which may contribute to further destabilization and terrorism.[79]

58. It is undeniable that, as with domestic terrorism, the labelling of an act as one of State-sponsored terrorism depends largely on the political perspective of the labeller. Indeed, the boundaries of the term "State-sponsored terrorism" are often expanded to encompass almost any act of violence or threat of violence which suits the purpose of the labeller or, alternatively, are limited and skewed to take in only those acts with whose perpetrators or aims the labeller is at odds. As a respected commentator on terrorism has written, "[a]n act committed by an opponent State will be readily condemned as State-sponsored terrorism, whereas the same act committed by an ally (or one's own country) will be called something else, or justified, or simply not commented on".[80] Such propagandistic and explicitly politicized use of the concept of State-sponsored terrorism has not only contributed to the already existing general confusion (both accidental and deliberate) over the precise legal content of terms and labels relating to terrorism, but has also resulted in a wide range of nations being identified as terrorist sponsors, even where the evidence for it is not solid or lacks the necessary clarity. Conversely, political and economic considerations and pressures, and the realities of international relations, have often been the reasons behind the extreme reluctance of States to name others as terrorist sponsors, even in those cases where clear and solid evidence has existed.

59. This double-standard morality and the ensuing basic dishonesty that allows States to look for a State sponsor behind almost all acts of terrorism that are against their interests while themselves denying that there is any remote similarity in their own aiding of repressive regimes or revolutionary movements in other parts of the world, have stood in the way of objective analysis and understanding of the relation of State-sponsored terrorism to other forms of conflict between States. They have also led to misleading estimates of the threat that State-sponsored terrorism poses to both the domestic and the international society, and have often engendered unwarranted overreaction and counter-terror,[81] thereby increasing the terrorism-generating qualities of certain foreign policies and undermining the already vulnerable international democratic institutions or the balance of international relations.[82]

60. It hardly needs to be said in this context that State-sponsored terrorism raises many serious and difficult problems under different aspects or areas of international law, namely the law of armed conflict and humanitarian law, the law of responsibility and that of sanctions, including legitimate self-defence. Obviously, this is not the place to discuss these in any detail. Nor is it the place to consider tactics and measures adopted in response to State-sponsored terrorism.[83] For present purposes, it suffices to focus attention on the repudiation of State-sponsored terrorism of all varieties contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970 - an instrument that is regarded as an authoritative interpretation of broad principles of international law expressed in the Charter and which marks an important development in the area of international law pertaining to international terrorism.[84]

61. This significant international instrument establishes in principle 1 (containing the basic prohibition of the use of force in international relations) the duty of every State to refrain from "organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State" and, further, the duty of every State

to refrain from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts". Moreover, it asserts in principle 3 (containing the basic prohibition of foreign intervention), that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State".[85]

(c) International State terrorism

62. While the concept of State terrorism usually refers to regime or government terror in the domestic or occupied territory setting (as already described under (a) above), or to current international political terrorism that is State-sponsored or State-directed (as explained under (b) above), it is necessary to note, for reasons of completeness, an even wider view of this concept which is sometimes taken in the international relations scholarly community and in debates within the framework of the United Nations. This view does not simply expand the scope of the concept of State terrorism from the domestic to the international plane but enlarges it still further to a degree that would include - and literally amount to - the resort to force in international relations.[86]

63. Thus, starting from such premises as that "[t]he State ... is as much a user of terror in its international affairs as in its domestic activities",[87] some international relations scholars have argued that coercive diplomacy and other overt State behaviour such as resort to the application of terror tactics in international relations (i.e. reprisals and bombing raids designed to produce damage and instil fear or, alternatively, the show of force or use of force as employed in the cold war period by the two super-Powers within their respective spheres of influence, nuclear deterrence and the "balance of terror") are cases of (international) State terrorism, whether in war or non-war situations.[88]

64. The same enlarged concept of State terrorism has been taken by some State representatives when discussing issues of terrorism in the relevant organs and bodies of the United Nations and is, therefore, reflected in official documents along with the record of debates. Thus, for instance, the 1973 report of the Ad Hoc Committee on International Terrorism refers to this concept of State terrorism endorsed by a number of States, in the following terms:

> "terror inflicted on a large scale and with the most modern means on whole populations for purposes of domination or interference in their internal affairs, armed attacks perpetrated under the pretext of reprisals or of preventive action by States against the sovereignty and integrity of third States, and the infiltration of terrorist groups or agents into the territory of other States".[89]

65. There is, however, strong disagreement in both the policy and the scholarly communities over such an expansion of the concept of State terrorism, an expansion which, in turn, has an impact on the already overloaded term "terrorism" to the point where it becomes unmanageable.

In the words of a learned commentator who shares this view:

> "every type of objectionable act - or arguably objectionable act - that a State may take on the international level, including military manoeuvres and war games in the vicinity of another State which present a threat to that other State, the transport of nuclear weapons through the territory of other States and international waters and the development, testing and deployment of nuclear and space-weapons systems".[90]

are not manifestations of State terrorism, nor is such an "unwarranted" extension of the concept of "terrorism" generally held.[91]

66. Without regard to one's view of the extent to which State activities such as those mentioned above do or do not qualify as State terrorism, the Special Rapporteur would like to recall at this point that recourse to war and the prohibition of force are governed by international law. As is well known, the basic notion embodied in the Chapter of the United Nations is that the threat or use of force is prohibited in international relations (art. 2, para. 4), unless undertaken in self-defence (art. 51) or in terms of the exception provided for in the final sentence of the domestic jurisdiction clause (art. 2, para. 7). It is, moreover, well-understood that the "illegal" use of force in international relations will be considered under customary international law, international human rights and humanitarian law, the law of armed conflict and international criminal law. It could result in individual criminal liability for the leading policy makers and engage as well the responsibility of the State.

67. Of course, this is not the place to go into this matter in any detail. It is sufficient for our purposes to specify at this juncture the following considerations. (a) While war is not necessarily, or even normally, a species of terrorism, belligerent practices and threats may be. (b) Terrorist acts can be committed by States against States, in both war and non-war situations. (c) State-sponsored terrorism in the modern world can, indeed, take many forms, and does not only consist of the assisting or directing of terrorist groups abroad but of other types of terrorist attacks also.[92] This factual situation, coupled with the current inconsistencies and imprecisions in the terminology used by both commentators and policy makers, often results in confounding the boundaries between (international) State terrorism and State-sponsored terrorism.[93] (d) From the legal point of view, the distinction between (international) State terrorism and State-sponsored terrorism is immaterial, since the invocation of either one of them would have exactly the same results (i.e. identification of the violated international law norms, articulation of charges reflected in the relevant international law norms, renunciation of alleged behaviour, etc., and the attendant question of responsibility).

4. Manifestation of sub-State (or individual) terrorism

68. In contrast to the phenomenon of State terrorism stands the phenomenon of sub-State (or individual) terrorism, which is much more diverse in the forms it takes. As is well known, scholarly concern and the vast bulk of the literature on the subject of terrorism has until now concentrated primarily on this type of terrorism, which embraces the anti-State terror tactics of individuals and groups large and small, nationalists, separatists, liberation fighters, and so on.[94]

69. On the diversity of sub-State (or individual) terrorism, one of the leading scholars on terrorism has written pertinently:

> "Terrorism, interpreted here as the use of covert violence by a group for political ends, is usually directed against a government but is also used against other ethnic groups, classes or parties. The aims may vary from the redress of specific grievances to the overthrow of a government and the seizure of power, or to the liberation of a country from foreign rule. Terrorists seek to cause political, social and economic disruption, and for this purpose frequently engage in planned or indiscriminate murder. Terrorism may appear in conjunction with a political campaign or with guerrilla war, but it also has a 'pure' form. It has been waged by national and religious groups, by the left and the right, by nationalist as well as internationalist movements, and it has been State-sponsored ... Terrorist movements have frequently consisted of members of the educated middle classes, but there has also been agrarian terrorism, terror by the uprooted and the rejected, and trade union and working-class terror ... Terror has been directed against autocratic regimes as well as democracies; sometimes there has been an obvious link with social dislocation and economic crisis, at other times there has been no such connection".[95]

70. As the above citation clearly shows, this dimension of terrorism is so disparate and vast that it is difficult to reduce and comment on it here in a manageable way. In addition, some of its aspects are extremely controversial, with many diverse and contending points of view. In her previous work, the Special Rapporteur has already drawn the attention of the Sub-Commission to a number of problems of sub-State terrorism in relation to international and human rights law which need to be carefully examined, stressing especially the question of the accountability of non-State actors.[96] She has also received a number of submissions from Governments and non-governmental organizations, some important ones arriving too late to receive the attention they are due and at a time when the size limitation placed on progress reports has already been surpassed. At this point, the Special Rapporteur is convinced that further review of and reflection on this topic would better serve its examination. Accordingly, she will postpone the discussion on the manifestations of sub-State terrorism to a later stage, in order to present it in a more integrated form.

C. Lessening the controversy: the necessity to distinguish terrorism from armed conflict

71. In seeking a definition of terrorism it is essential to set out the difference between armed conflict and terrorism.[97] The Special Rapporteur recognized from the beginning of her work that this issue has been quite contentious in the international community, as illustrated by the oft repeated phrase "one person's terrorist is another person's freedom fighter".[98] Concerns have been raised by many States about wars of national liberation in the context of the right to self-determination.[99] These States are determined not to allow the terrorism debate to encroach unduly on this fundamental principle.[100] Others have focused on what is increasingly called "ethnic conflict" or even "nationalist/separatist conflict", even at times giving the impression that any conflict described with those labels is necessarily related to terrorism. The debates in the framework of all United Nations organs and bodies reflect these concerns. However, the

Special Rapporteur notes the almost total absence of any legal analysis of these critical areas in the international dialogue. As a consequence, she thinks that it is time to address this issue, because without the clear separation of war and terrorism, there will be no meaningful progress towards a definition of terrorism and, more importantly, no chance to implement meaningful measures to combat terrorism.

72. An obvious reason to distinguish clearly armed conflict from terrorism is because the law of armed conflict (and humanitarian law) automatically comes into effect when there is an armed conflict. This body of law has long-settled definitions, as well as clear obligations, regarding all aspects of military conduct involving both military operations and weaponry (The Hague law) and the protection of victims of armed conflict (Geneva law).[101] Under the law of armed conflict, acts of war are not chargeable as either criminal or terrorist acts. Most importantly, there are clear obligations regarding their enforcement, not the least of which is to respect humanitarian law in all circumstances.[102] Thus it is necessary to distinguish war from terrorism and acts of war from acts of terrorism.

1. Armed conflict and terrorism

73. Armed conflict is a situation where two or more parties armed with military materiel engage in military operations (acts of war) sufficient to meet the customary definitions of armed conflict. What is sufficient in terms of military operations varies depending on whether the conflict is an international armed conflict or not.[103]

74. There is scant guidance in customary humanitarian law regarding the degree of military activity required to constitute an international armed conflict and, hence, to entail the automatic application of international armed conflict law to the situation. However, practice seems to indicate that even very little military aggression on the part of one State against another State is viewed as being sufficient. Most military aggression, however, is quite overt and, although a declaration of war may not be made, the international community is aware that there is an armed conflict.[104]

75. In the case of armed conflict "not of an international character occurring within the territory" of a State (in the terms of common article 3 of the 1949 Geneva Conventions), article 1.1 of the 1977 Protocol Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) rounds off the vagueness of common article 3 of the Geneva Conventions and supplies the criteria of military action sufficient to define non-international armed conflicts (otherwise, "internal" or "civil" wars). Article 1.1 provides that Protocol II applies to all armed conflicts which take place in the territory of a State between its armed forces and dissident armed forces or other organized armed groups in sufficient control over a part of its territory as to enable such groups to carry out sustained and concerted military operations and to implement Protocol II.[105] Like common article 3 of the 1949 Geneva Conventions, Protocol II does not apply to situations of internal disturbance and tension, such as riots, isolated and sporadic acts of violence and other acts of a similar nature (which are not deemed to be "armed conflicts").[106] At lower levels of violence, the distinction between "armed conflicts" and internal disturbances is not free from difficulty, and yet it is also open to abuse.

76. A particular war may arise in an ethnic context - hence the currently popular term "ethnic conflict". Nevertheless, the situation is still a war governed by humanitarian norms and is either a civil war or an international war - which in the case of the "ethnic conflict" label is more than likely a war of national liberation. Similarly, a particular war may arise in a "national/separatist" context; like an "ethnic conflict", it is nonetheless governed by humanitarian law.[107] The popular use of these terms cannot legally annul the obvious application of humanitarian law to the combatants in these armed conflicts.

77. For purposes of determining if a situation is an armed conflict or terrorism, it is rarely necessary to decide whether an armed conflict is a civil war or one in which a group with a claim to self-determination is fighting for national liberation. Many groups engaged in armed conflict claim the right to self-determination. Legal and factual analysis may or may not support such claims. However, if there is armed conflict sufficient to invoke humanitarian law, then humanitarian law has to be applied.[108] Where the international community will have political difficulty is not as to whether there is a war or terrorism, but in determining what type of armed conflict it is. This legal/political controversy, however, belongs not in the debate on terrorism but in debates on which provisions of humanitarian law apply - those governing civil wars or those governing wars identified in article 1.4 of Additional Protocol I.[109] That debate would have to take into account, of course, the principle of self-determination, as set out in the Charter of the United Nations, human rights instruments and resolutions, with regard to the armed conflict in question. Legitimate concerns, raised by the OIC and others in many forums, that the attempt to define terrorism could result in an erosion of the principle of self-determination, could be favourably addressed in the framework of humanitarian law.

78. This is not to say that a situation which is clearly an armed conflict between either two governments, or a government and a group engaged in armed conflict in the defence of its right to self-determination, or a group meeting the test for civil war may not also generate groups unaffiliated with the combatant forces that engage relatively exclusively in terrorist acts. Thus, there may be groups that could be called terrorist groups whose acts may arise from a political position regarding the armed conflict, but who are, for want of a better term, acting outside the armed conflict.

79. Requiring rigour in these determinations does not mean that all acts undertaken in the course of armed conflict are legal acts of war. Humanitarian law identifies acts that are prohibited under the laws and customs of war and, hence, are chargeable as illegal acts. Customary international law, as well as the Geneva Conventions and their Additional Protocols identify those illegal acts that are considered especially serious international crimes when taking place in armed conflicts.[110] While there is no mention of terrorist acts in the 1907 Hague Convention and Regulations or the 1949 Geneva Conventions, specific mention of a prohibition of terrorism as a method of warfare is made in Additional Protocol II, article 4.2 (d). Additional Protocol I, article 51.2 prohibits war-time "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". It makes no legal sense to focus solely on terrorist acts carried out by combatants in the context of armed conflict and to disregard other acts that also violate the rules of war at the same level of gravity. Allegations of any and all violations of the rules of war should be made in the context of applicable armed conflict law, its enforcement provisions and all the protection and guarantees they provide.[111]

80. There is sometimes an obvious reluctance among States to take seriously and impartially their obligations under the enforcement provisions of humanitarian law instruments. This might be one of the reasons why debate regarding certain armed conflicts is sometimes shifted to debate on terrorism. In any case, the Special Rapporteur notes that in the cases of the former Yugoslavia and Rwanda there has been concerted international effort to address violations of the parties in an impartial way.[112] It remains to be seen how the International Criminal Court, once it is established, will improve the overall situation.[113] Regardless of the status of the Rome Statute, existing international humanitarian law rules provide that any State may seek out and try alleged violators of the laws and customs of war in its national courts or turn such persons over for trial in another State, provided that they do so with impartiality and in proceedings that meet minimum standards.[114] Whatever the perceived gain that may be behind States' unwillingness to do this and address wars as wars, the removal of some of the current armed conflicts from the terrorism debate would be a major gain in the potential for progress in defining and acting on reducing terrorism.

81. There remain, however, cases where there may be political or other difficulties in determining whether a situation is an armed conflict or terrorism. Thus, for example, in the context of article 2 common to the Geneva Conventions, which provides that humanitarian law applies in all cases of partial or total occupation of territory "even if the said occupation meets with no armed resistance", the following situations may be envisaged. (a) A situation where there has been long-time acquiescence to an occupation but where the occupied people subsequently try to restore or gain their claim to self-determination to the point of taking up arms. Their military actions may be few in number, or relatively ineffective - in other words, not meeting a minimum definition of armed conflict. The occupying power may, then, invoke its long occupancy as proof that its occupation is legitimate and characterize any and all use of force against it as terrorism.[115] (b) There is a situation of nascent civil war - i.e., a situation where there are armed groups who either do not control sufficient territory, or who engage in military activities that are more than sporadic but less than sustained, or whose actions do not qualify as military actions under the laws and customs of war. The group may or may not claim the right to self-determination, but if so, the claim may be, at best, dubious.[116] (c) In yet another situation, a group with a strong self-determination claim may use force, but almost exclusively in ways that clearly violate the laws and customs of war. With regard to the above situations, it can be argued that, in the first, characterization as terrorism could be incorrect, while in the second it could be correct. In the third situation, the perpetrators of acts that violate the laws and customs of war could be charged under applicable humanitarian law provisions or even anti-terrorism laws applicable in the given situation. It goes without saying that, in any event, the peoples' underlying self-determination claim remains intact.

III. CONTEMPORARY FORMS OF TERRORISM

82. Resolutions adopted by the Commission and Sub-Commission have indicated their concern over the possible exploitation of new technologies by terrorist groups. The Special Rapporteur recognizes the importance of the wide-ranging debate being carried on among academics, policy makers and non-governmental organizations on contemporary forms of terrorism. While such ill-defined labels as "superterrorism", "catastrophic terrorism", or "megaterrorism" are used with increasing frequency to describe manifestations of political violence that have arisen in the past 10 to 20 years,[117] it is essential to disaggregate the elements

grouped under these rubrics in order to achieve analytical clarity with regard to the actors and forms of violence. At first reading, the Special Rapporteur leans towards the view that (i) the plausibility of the threat must be grounded in the practicalities of the act, not in worst-case speculation; and (ii) that much of what is being described as terrorism could in fact also be categorized as non-terrorist activity.[118] These conclusions should be taken into consideration if a realistic account is to be made of possible solutions to the problems of human rights and contemporary forms of terrorism.

83. In studying this topic, the Special Rapporteur notes that most of the literature relating to it is by political scientists or sociologists and other scientists, not lawyers or human rights specialists, and is presented in a factual or speculatively factual way rather than as legal analysis. For this reason, the Special Rapporteur's discussion has to depart from her usual form of legal analysis. Thus, she begins by examining possible terrorist use of weapons of mass destruction (WMD) as this is the form of new technology that generates the most commentary. She then comments on the role of new information technologies in contemporary terrorism, giving special attention to the concept of "cyberterrorism". Other issues relating to new technologies may be presented at a later stage in her work.

A. Weapons of mass destruction and terrorism

84. The spectre of the terrorist use of WMD is unquestionably frightening. Apocalyptic depictions of hundreds of thousands of gruesome deaths caused by the detonation of a nuclear weapon or the release of anthrax in an urban area abound in the literature and are frequently invoked by States to justify counter-terrorist policies.[119] Precisely because of the potentially grave implications that both the terrorist use of WMD and counter-terrorism policy hold for the enjoyment of human rights, it is essential to consider carefully the reality of the threat and the efficacy of the counter-strategy.

1. Chemical weapons

85. Chemical weapons have existed for most of the twentieth Century. They can take liquid or gaseous forms and are generally separated into four categories: blister agents such as mustard gas; blood agents such as hydrogen cyanide; choking agents such as phosgene and chlorine; and nerve agents such as sarin, VX, tabun and soman.[120] Nerve agents are the most deadly as they block the enzyme cholinesterase, effectively short-circuiting the neuromuscular system and killing the victim almost immediately,[121] and are also of most interest to a group or individual intending to kill large numbers of people.

86. The technical feasibility of the terrorist use of chemical weapons can be broken down into two areas: production and delivery. While all the ingredients and equipment needed to produce chemical weapons are dual-use and most are readily available through commercial dealers,[122] the actual production of such weapons presents difficulties. Although estimates of the amount of experience needed to produce chemical weapons range from a high-school knowledge of chemistry to extensive post-graduate work, most experts agree that some graduate education is necessary to produce nerve agents, for example, safely in large quantities.[123] Estimates of the

cost of setting up a functioning nerve agent production plant similarly range widely, from US$ 20,000 to US$ 20 million.[124] The only effort to regulate the export of dual-use equipment and chemical precursors has been that of the 30 countries comprising the Australia Group, whose effort must be expanded and intensified if it is to function effectively.[125]

87. Nerve agents can be delivered by many devices, from bombs to sprayers to punctured plastic bags. Most experts agree that the only effective way of distributing nerve agents over large areas outdoors is via aerosolization, a means that requires high levels of technical skill and is easily disturbed by environmental conditions.[126] Moreover, even under optimal conditions, "hundreds to thousands of kilograms" of agent are necessary per square kilometre.[127] An outdoor attack would likely kill no more than several hundred people. At best, dispersing the agent inside a building might kill a few thousand. Thus, for terrorist use a chemical weapon would do nothing that a conventional bomb could not do more easily and with more certainty.[128] The amounts necessary would take months or years to produce in any but the largest production facilities.[129]

88. The experience of the Aum Shinrikyo cult in Japan provides insight into the problems for potential terrorists of using chemical weapons. Aum executed two effective nerve agent attacks: the 27 June 1994 sarin attack in Matsumoto, Japan, that led to seven deaths and 144 persons being injured and the 20 March 1995 sarin attack on the Tokyo subway that left 12 dead and over a thousand injured.[130] At its peak in 1995, Aum had 40,000 members worldwide, with total assets reported as ranging from tens of millions to 1.4 billion United States dollars.[131] Their membership included a number of young scientists and technicians, and Aum had established an international network to obtain chemicals and equipment. Despite their massive funds, infrastructure, skills and apparent determination to produce mass casualties, their nine attempts at using biological weapons were unmitigated failures. They then switched to chemical agents and conducted their two deadly attacks. However, neither produced deaths on the scale that is usually cited in the WMD terrorism literature or, indeed, that Aum had hoped for. The delivery methods were crude: in the first attack, a large fan and a heating element, and in the second, punctured plastic bags. Even Aum, the paradigmatic example of a terrorist group using chemical weapons to cause mass casualties, could not surmount the technical obstacles to do it.[132]

2. Biological weapons

89. Biological weapons are exponentially more deadly than chemical weapons but, fortunately, also more difficult to produce and deliver.[133] Biological weapons are generally separated into four categories: bacteria, including anthrax and plague; viruses, including yellow fever, Ebola, and Venezuelan equine encephalitis; rickettsiae, including Q fever; and toxins, including ricin and botulinum toxin. Some are communicable, and many have an incubation period, making them hard to diagnose and counteract.

90. In terms of production, the acquisition of seed cultures is the most difficult obstacle. While some cultures could in the past be ordered legally from international collections, export controls are now being more strictly enforced.[134] Growth media and equipment are relatively easy to obtain. As with chemical weapons, estimates of the technical knowledge needed to

produce biological weapons range from a basic knowledge of biology to years of post-doctoral work, though again it is generally agreed that some graduate-level experience is required. The total cost of building a small biological weapons production facility might range from US$ 200,000 to 2 million. There are several trade-offs involved in production: while wet agents are easier to produce, they are much less effective than dry agents, and the more pure an agent is, the less stable it is.[135] Doctors and medical researchers generally cite anthrax, plague, smallpox, and botulinum toxin as the most probable candidates for use by terrorist organizations.[136]

91. Because of the extreme sensitivity of biological agents to environmental factors like sunlight, humidity and temperature, they are very difficult to deliver effectively in large quantities.[137] The creation of a respirable aerosol represents the most difficult technical challenge, as was evident in Aum's series of failures at spreading anthrax through aerosolizers.[138] In fact, there has never been a biological weapons attack by a terrorist that resulted in more than one death,[139] testament to the inherent difficulty of producing and delivering a biological agent over a large area.

3. Nuclear terrorism

92. Experts generally agree that the acquisition and use of nuclear weapons by terrorists is less likely than the possible use of chemical or biological weapons. Although stories abound of the smuggling of stolen nuclear weapons, including the notorious "suitcase bombs", there has been no confirmed sale of a nuclear weapon and no non-State actor has ever been confirmed as possessing a nuclear weapon, let alone detonating one.[140] Still, the problem of "loose nukes", as it has been termed, requires a concerted multilateral effort to account for nuclear weapons and to put them under safeguards.[141]

93. Those, groups or individuals, who cannot obtain a ready-made nuclear weapon could try to construct one themselves, although this would require a high level of technical knowledge and the acquisition of a suitable amount of weapons-grade, or at least weapons-usable, fissile material, either highly enriched uranium (HEU) or plutonium.[142] Although rumours likewise abound around the putative market for nuclear materials, there has not been a single case involving enough material to actually make a bomb.[143] Some experts even question the existence of a demand for fissile material or nuclear weapons.[144] The most difficult manner of obtaining a nuclear weapon is to produce one's own HEU in a reactor. The prime example of a clandestine project of this sort is South Africa, where the total cost was nearly US$ 200 million.[145] The cost of a project that had obtained fissile materials would be much lower.

94. Other possible forms of nuclear terrorism may include the use of radiation-dispersion devices, radiological weapons that utilize more easily obtained non-fissile radioactive isotopes to disperse a powder of radioactive materials. Although generally considered impractical for standard military use, they could be useful for instilling terror in a population even if the casualty count would probably be quite low.[146] Another potential form of nuclear terrorism is the sabotage of nuclear reactors. Chechen rebels, for example, have repeatedly threatened to do this in Russia, and some experts consider this to be the most plausible form of nuclear terrorism.[147]

4. Potential use of weapons of mass destruction

95. Most chemical biological and nuclear weapons have existed for decades. Terrorism is a phenomenon with a centuries-longer history. It has been suggested that in the recent explosion in writing and policy-making concerning the possibility of their combination, the Aum Shinrikyo subway attack was the most important catalyst, as it represented the first significant instance of the terrorist use of WMD in a modern urban environment.[148] Suddenly, the debate was transformed from "will it happen?", to "when will it happen again?", as experts assumed that terrorists' normal fondness for mimicry would lead others to attempt similar attacks. In addition, new interest in alleged biochemical weapons programmes and concern over vulnerable nuclear, chemical and biological weapons stockpiles[149] in the hands of certain Governments gave rise to the fear that WMD were more easily available, either from "State sponsors" or on the black market.

96. But the question of why terrorists would use WMD remains. In the oft-quoted phrase of a well-known expert on terrorism: "terrorists want a lot of people watching, not a lot of people dead".[150] That is to say, terrorists are cognizant that an extremely lethal WMD attack could alienate their supporters or cause a fatal counter-attack by the Government. Moreover, terrorists might be fearful of handling and using such dangerous substances themselves, and might consider conventional weapons as satisfactory for their needs.[151] In the face of this orthodoxy, two arguments are generally made by experts and policy makers to support the possibility of the terrorist use of WMD. First, many point to the "increasing lethality" of terrorist attacks and, extrapolating from the trend, argue that terrorists will turn to WMD as they become more familiar with their deadly capacities.[152] Second, many have sketched out the portrait of a "new breed" of terrorists who, breaking from the traditional terrorist mould, are willing to use WMD. This new breed is variously characterized as "nihilistic", "religiously-oriented", "fanatical", "fundamentalist", "apocalyptic", "ethnic" and always "extremist".[153] These new actors' other-worldly orientation and lack of concrete political objectives release them from the restraints of orthodox terrorists and they are willing to use WMD to carry out their agenda of mass destruction.

97. The Special Rapporteur believes that it is essential to avoid falling prey to alarmist analyses of the potential for WMD terrorism and, hence, becoming complacent towards the possible violations of human rights that can easily accompany a counter-terrorist strategy premised on these dire warnings. Some of the technical obstacles to obtaining and utilizing WMD were outlined earlier. Even if these obstacles are overcome, the evidence still speaks against the possibility of an imminent WMD attack by terrorists. Worldwide in the last 25 years, there have only been five WMD attacks by terrorists that caused 10 or more deaths (the most being only 19) and all used chemical weapons with "low-tech" delivery methods.[154] In total, according to one source, from 1975 to July 2000, there were two fatalities and 752 injuries due to the terrorist use of biological weapons, and 150 fatalities and 2,492 injuries due to chemical weapons.[155] These data are clearly dwarfed by the hundreds of deaths caused by many conventional terrorist attacks.

98. All this does not mean, of course, that these numbers are trivial, or even that the probability of a future slide to mass destruction terrorism is unlikely and, therefore, should not capture our attention. It only means that the link between the recent increased lethality of terrorist attacks and the use of WMD appears questionable. Indeed, this increased lethality has not been a result of the use of WMD but rather of a string of deadly conventional terrorist attacks, such as the 13 simultaneous bombings in Bombay in 1993, the 1995 bombing of the Federal Building in Oklahoma City and the 1998 bombing of the United States Embassies in Nairobi and Dar-es-Saalam. Further, experts in the field have convincingly argued that an analytic distinction should be drawn between the small-scale use of WMD in tactical attacks and the use of WMD for the purpose of mass destruction.[156] Be that as it may, this is not the place to speculate in more detail on the potential use by terrorists of WMD. The Special Rapporteur thinks that given the serious doubts about the likelihood of imminent use of WMD by terrorists we should be wary of overinflating the dangers of "catastrophic", "postmodern" terrorism or "superterrorism", which carry with them potential justification of counter-terrorist machinery with the associated potential infringements upon civil liberties and human rights. For example, the threat of WMD could lead to the invoking of stringent restrictions and an increase in police powers. These and other adverse effects of a climate of fear (engendered by the fear of terrorism) can prompt a reduction of human rights as readily as an actual terrorist presence.[157]

B. Terrorism and new information technologies

99. There are a number of delineations that must be made concerning the rhetoric surrounding contemporary forms of terrorism and the new information technologies (NIT). First, NIT can be used by terrorists or other groups for organizational purposes and as a means of disseminating their own information. This use of NIT can give rise to new network forms of organization that are especially useful for terrorists, criminals and other organizations working in opposition to States.[158] The all-channel network is especially effective, as it allows for an organization that is cemented ideologically and linked by constant information flows from every node to every other node, while not presenting any single privileged point at which the enemy can attack. E-mail, Web pages, bulletin boards, fax machines and cellular telephones provide the technical infrastructure for these new forms of organization and also provide ways for small groups with few resources to disseminate their information throughout the world instantly. It must be made clear that the use of NIT by terrorist groups for propagandistic or organizational purposes may not necessarily qualify as terrorism itself, unless it meets legal standards for incitement.

100. The use of NIT as a destructive tool has become popularized under the name "cyberterrorism". But, just as the use of NIT for propagandistic purposes may not be terrorism, so many uses of NIT for disruptive or destructive purposes may not be terrorism either.[159] Thanks to the rapid spread of the Internet, would-be hackers around the world have a wealth of tools at their disposal, ranging from notorious viruses to such lesser-known weapons as "logic bombs", "worms", and "Trojan horses".

101. Moreover, as personal computing capacities have increased dramatically over the last decade, hackers can launch multinational coordinated attacks upon computer systems, breaking in and crashing networks, destroying data, and shutting down systems dependent upon computer networks. While a number of different categories of actions fit within this framework, they do

not all fit under the rubric of "cyberterrorist". The Special Rapporteur would reserve the label of cyberterrorism for those acts whose intention is to cause disruption or destruction sufficient enough to terrorize the population. Oft-cited examples of this are attacks upon air traffic control systems, the commandeering of weapons systems and the disruption of emergency medical communications. Actions of this sort seem indeed to qualify as the use of NIT for terrorism, but the label should not be allowed to spill over onto other classes of actions. Further, it should be noted that, despite the alarmist rhetoric, amongst the reportedly thousands of attacks by hackers which major computer systems face daily, to date there has been no confirmed report of a cyberterrorist attack. In fact, many experts deem such an attack as extremely unlikely, because of its difficulty and potential inefficacy.[160]

IV. THE IMPACT OF TERRORISM ON HUMAN RIGHTS

102. Terrorist acts, whether committed by States or non-State actors, may affect the right to life, the right to freedom from torture and arbitrary detention, women's rights, children's rights, health, subsistence (food), democratic order, peace and security, the right to non-discrimination, and any number of other protected human rights norms.[161] Actually, there is probably not a single human right exempt from the impact of terrorism.

103. In its resolutions 1999/27 of 26 April 1999 and 2000/30 of 20 April 2000, the Commission requested the Special Rapporteur to give attention to the questions presented in these resolutions: certain human rights, concern for the victims, concern that counter-terrorist action may not fully comply with international human rights standards, and special concern about hostage-taking, kidnapping and extortion. The Commission's resolution 2001/37 of 23 April 2001, is essentially identical on these points to the two aforementioned resolutions. It is also worth noting in this context that during the preceding debates many statements by Governments as well as non-governmental organizations drew particular attention to the curtailment of procedural rights provided in international human rights instruments in cases of persons charged under national anti-terrorism laws. As usual, there was a large divergence of views expressed regarding the issue of non-State actors. Accordingly, the Special Rapporteur will now attempt to address some of these questions, although, regrettably, briefly owing to the size constraints on reports.

A. Direct impact

1. General concerns

104. In her review of terrorist hostage-taking, kidnapping and extortion carried out by terrorist groups, the Special Rapporteur has found that these acts are mostly carried out by known groups who predominate in only a few areas. The political issues involved in these areas are also well known. In the context of a study on terrorism and human rights, it is difficult to know what the Commission wishes of the Special Rapporteur regarding these acts except to note again that there have been few new instances of new groups engaging in them. This does not mean that such acts may not be committed in the future in other areas by new groups, but it is difficult if not impossible to predict where they might occur. Criminal liability for these acts remains a concern of national and existing international law, including the requirement of international cooperation in apprehending persons alleged to have engaged in such acts.

105. The Commission has also expressed its concern about rape by terrorist groups. In this connection, the Special Rapporteur draws attention not only to the work of the Commission regarding violence against women and the work of the Commission's Special Rapporteur on violence against women, its causes and consequences, but also to the relevant work of the Sub-Commission and of its Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict.[162] The Commission has already resolved that rape by non-State actors constitutes a violation of the rights of women.[163]

106. States have an affirmative duty to promote and protect the human rights of all persons under their jurisdictions. While this is a basic tenet of human rights law, it is important to recall it here as both the Commission and the Sub-Commission have stressed this point in the context also of terrorism.[164] States that resort to State terrorism, whether international or internal, grossly violate the basic concepts of human rights. Such States should be subjected to both international condemnation and international action in the light of instruments and mechanisms of human rights and, where applicable, humanitarian law. Such action, if effective, would greatly diminish incidence of terrorism today.

107. When terrorist acts or threats of terrorist acts by non-State actors threaten the lives and safety of persons under a State's jurisdiction, it is the responsibility and the duty of the State to protect those persons. A State's minimum response should not be limited to proscribing terrorist acts in its criminal law system or in the training of local and national law enforcement or military personnel. Such a response would be, in the Special Rapporteur's view, too narrow and limited, and would not result in meaningful protection from terrorist acts. A State must also undertake a thorough study of all aspects of terrorism, including causal factors and the implications of its foreign and domestic policies in the light of international law (especially in terms of human rights) that have generated a risk of terrorist acts being committed against its citizens or persons under its jurisdiction.[165] Were all States to do this in an unbiased way, and then adopt meaningful responses - which may or may not require changes in policies - the incidence of terrorist acts by non-State actors would also dramatically decline.

108. Unfortunately, some States consider that to focus any attention on the causes of terrorism has the undesired effect of generating sympathy for, if not the terrorist acts, at least, the context in which they arise. Public opinion may then be rallied to pressure a State to change a policy that it does not want to change, even at the cost of increased fear of terrorism. Additionally, some are of the opinion that focus on the causes that might result in changes of policy could be viewed as giving in to terrorist demands. Even so, States are sometimes obliged to change policies that contravene international law. Yet this is not viewed as giving in to terrorist demands, in spite of the fact that a terrorist group may seek those very changes.

109. Sometimes, a State may utterly fail to protect its people in an effective way from acts of terrorism. In these situations, one could say that the State is either unable (incapable) or unwilling - or both - to control those acts. The State, then, has effectively reneged on its affirmative duty to protect its own people. Such a State, in these situations, can itself be liable for acts carried out by non-State actors.[166] On the other hand, a State's over-response to

terrorism can also effect human rights. Thus, the Commission has repeatedly expressed concern over counter-terrorist measures, as evinced in its latest resolutions on human rights and terrorism that state yet again that measures to counter terrorism must be in strict conformity with international human rights law.[167]

110. In this context, the rights to freedom of speech, association, belief, religion and movement, and the rights of refugees are particularly vulnerable to undue suspension in the guise of anti-terrorist measures. This may sometimes occur when individuals or groups in a State express support for a political position that is in opposition to the government's position but conforms with that espoused by a group labelled as terrorist.

111. It should, finally, be noted that a number of States either have or are in the process of enacting anti-terrorism legislation which is frequently criticized by legal scholars and human rights defenders.[168] Some of this legislation contains no definition of terrorism, while some contains lists of certain acts. Some of it includes provisions in which groups are put on an official terrorist list, frequently with no analysis of the particulars of the situation or the nature of the group. Those groups and others espousing similar views but uninvolved with the groups concerned may face severe consequences. As will be set out below, judicial proceedings to challenge this false labelling or to defend a person charged with an offence under such anti-terrorism legislation may leave room for serious negation of a wide range of procedural rights.

2. Special note on judicial process rights

112. The Special Rapporteur has reviewed a number of national laws regarding terrorism and the comments of States that have responded either to the initiative of the General Assembly or to this study.[169] While some national laws take full account of international human rights norms, others do not in very significant ways. Accordingly, she thinks it should be of high interest to set out some of the situations that could give rise to a serious possibility of misuse and abuse of defendants' rights.[170]

113. In some States, detained persons considered as terrorists may be denied visitation rights.[171] This can include the denial of access to a defendant's own attorney, or such severe restriction of access to counsel, including the constant presence of State officials in attorney-client sessions, as to reduce the right to counsel to a nullity. The defendant is held, essentially, incommunicado.

114. States may have special procedures that allow identity checks, house-to-house searches and other acts that have implications for both privacy rights and fair trial provisions.[172] The State may lower the standard for a warrant, for example, or eliminate the need for a warrant at all. Not only a defendant but also large numbers of uninvolved persons may be subjected to serious encroachment on their rights, especially with house-to-house searches and other intrusions into privacy.

115. Some States have provisions that affect the actual judicial proceedings. For example, persons accused of terrorist acts may be limited in the number of witnesses that may be called, or may even be denied any witnesses at all. This can seriously impair any attempt by a defendant to prove he or she has no association with a particular group considered to be terrorist, or had nothing to do with a particular act. This could be of great importance if the person is charged not with a terrorist act directly but under group liability statutes.

116. A defendant may also seek to prove that a group to which he or she is ascribed is not by law a terrorist group. Curtailment of witnesses such as experts in international or national law relating to the analysis of terrorism could seriously hinder the defence. The Special Rapporteur is keenly aware that there are complex legal questions at stake - questions that an ordinary defence counsel is ill-prepared to address even in the most highly educated of legal communities. Further, in many States the judiciary might be reluctant to countermand the State in these matters. Even in States with a relatively impartial, independent judiciary, there are few lawyers and judges with sufficient education in international human rights and humanitarian law standards to rule fairly, especially if a defendant is not allowed experts or other witnesses.

117. Judicial process rights may be especially at risk when a State uses group liability or conspiracy laws against alleged members of groups labelled as terrorist. For example, a person who may have once distributed literature relating to the same goal as an alleged terrorist group could be charged with aiding and abetting terrorism and could be charged with any acts proved to have been carried out by the group - acts of which a defendant has no involvement or even awareness. Conspiracy laws can be especially harmful to procedural rights in situations of internal or international armed conflict that a State has labelled as "terrorist". Such situations can dramatically impair rights under humanitarian law in cases where there is no group liability and where both legitimate military acts and acts in support of humanitarian relief cannot be criminalized.

B. Indirect impact

118. Either State or non-State actors may intentionally fan the fear of terrorist acts against a population. Fear out of proportion to actual risk can generate, for example, attitudes of generalized fear of a particular race or religion. Clearly, in a number of countries orchestrated denouncing of certain groups has already resulted in generalized racism and religious intolerance. Undue fear leads to weakened resistance to overly harsh anti-terrorism measures. The desire of a State to have such measures may lie behind fear campaigns. Some States may consider that the resulting racism and religious intolerance is useful to its political agenda and therefore worth the price. However, from a human rights perspective such cynicism is offensive and has had a serious negative effect on human rights wherever these policies occur.[173] In any case, there may be a serious risk of curtailment of basic civil liberties.

119. There are two related sub-issues to the undue fear situation, which - although highly political - have a direct relationship to human rights. A State's people may be motivated into an irrational fear of other States and of their leaders and people far out of proportion to any risk actually posed. This, of course, has a negative impact on the idea of international solidarity. The imposition of unilateral sanctions or other penalties by States sometimes, in an attempt to extend these sanctions and penalties to third party States, is a policy that the General Assembly has

repeatedly and forcefully rejected as being in violation of the Charter. While having an impact on civil and political rights, this also has and can continue to have a serious impact on economic, social and cultural rights, both in obvious and not so obvious ways. In any case, the practice of unilateral action can be viewed as violating the spirit of the international organization's appeals for international cooperation in addressing terrorism and terrorist acts.

120. The second of the sub-issues relating to undue fear of terrorism arises in the context of the "my freedom fighter is your terrorist" debate that the Special Rapporteur has already referred to above and in her previous work. Indeed, there may be a number of reasons why some States would purposefully mislabel armed conflict situations as terrorism, but the Special Rapporteur does not need to dwell on this here.

C. The question of impunity

121. The Commission and the Sub-Commission have both raised the issue of impunity in relation to terrorism.[174] Clearly, an important method of reducing terrorist acts is to deter future acts by resolute prosecution of those involved. Rather than deterring terrorism, State practices of impunity can only be viewed as encouraging terrorism.

122. The Sub-Commission has already addressed impunity involving civil and political rights, as well as economic, social and cultural rights, in two excellent studies.[175] While neither study directly addresses terrorist acts, terrorist acts viewed as impairing civil and political rights have been those drawing the most attention in the Commission and the Sub-Commission and on the part of the Special Rapporteur in her previous work and in the present report as well. Yet a review of the types of acts mentioned by Mr. Guissé in his report addressing economic, social and cultural rights leads the Special Rapporteur to consider that the following current practices could potentially be considered in the context of terrorism and human rights: structural adjustment programmes that severely impair subsistence-level economic rights (E/CN.4/Sub.2/1996/15, paras. 65-69), embargoes (paras. 70-72), corruption of government officials (paras. 73-79), monetary fraud (paras. 83-85), human caused ecological disasters (paras. 93-98), the manipulation of health systems and pharmaceuticals (para. 106) and the manipulation of foodstuffs (paras. 107-109). Mr. Guissé provides a two-part scheme for judicial measures addressing impunity: compensation for victims and prosecution of violators. He recommends that violations of economic, social and cultural rights should be declared international crimes with universal jurisdiction.

123. The Special Rapporteur rejects any impunity for terrorist acts, whether perpetrated by State or non-State actors, and involving civil, political, economic, social or cultural acts. Regrettably, impunity occurs, and in many guises. In the case of non-State actors, impunity can occur under the guise of selective prosecution or prosecutorial discretion. While this is occasionally valid, due to a realistic appraisal that existing evidence against persons accused of terrorist acts is unconvincing, in some situations there is sufficient evidence to prosecute but the State chooses to ignore it. In some States, victims of the alleged terrorist acts, or their survivors, may not have legal standing to compel a State to prosecute the perpetrators. These victims or their survivors may also be unable to bring a civil action for damages because of a wide array of judicial barriers.

124. A key question that arises in the context of impunity is the degree to which a head of State or other State official can avoid judicial consequences for State terrorism under the theory of sovereign immunity. However, as has been made clear in post-Second World War tribunals, as well as in the tribunals recently established to address issues arising in the former Yugoslavia and Rwanda, there can be no sovereign immunity for war crimes, genocide or crimes against humanity. To this list, the Special Rapporteur thinks that State terrorism could be added, although, as already made clear above, in many instances of State terrorism, the State has engaged in either war crimes, crimes against humanity or genocide against its own people or nationals of another State.[176] Nevertheless, the Rome Statute of the International Criminal Court has not included acts of State terrorism occurring outside the context of armed conflict or genocide.

D. Extradition

125. Extradition of a person alleged to have committed a terrorist act from one State to another, legally-interested State is one way the international community can address impunity. International anti-terrorism instruments and most of the existing regional comprehensive conventions on terrorism have a heavy focus on the issue of extradition, in large part because extradition is almost universally viewed as a powerful tool in preventing impunity and, as a consequence, reducing terrorism. The fear of extradition to a State targeted by their acts or to a State that will prosecute is considered a major deterrent for potential terrorists. Thus, it is important that persons who might be persuaded to commit terrorist acts know that, if captured, they would surely be prosecuted. Such persons must also understand the relationship between the law of political asylum and the evolving law of terrorism, under which persons who have committed terrorist acts may not be granted asylum.[177] Thus, an international regime with operative extradition laws, in which there is no safe haven for persons who have committed terrorist acts, could be viewed as an effective deterrent to terrorist acts.

126. Of course, there should be careful scrutiny of calls by one State to another State to hand over persons accused by that State of having committed terrorist acts. Likewise, when calls for extradition are subject to judicial proceedings, courts should carefully review such appeals to ensure correct application of, inter alia, humanitarian law.

127. Extradition requests can also generate conflicts in the area of requisite evidence for a prima facie case, burdens of proof and other procedural issues that are not fully addressed in the regional conventions. Such conflicts could lead to a denial of an extradition request. Requested States or alleged perpetrators may also invoke a variety of forum non conveniens defences. For example, a requested State may refuse to turn over an alleged perpetrator to a State that might directly, or through its judicial system, violate a defendant's rights. In this regard, action has been taken to prevent return of requested persons to States having the death penalty. There are other factors relating to human rights compliance that a requested State may take into consideration prior to ordering extradition. In this regard, it is especially important that States have practices and judicial systems that fully comply with international human rights and humanitarian law norms, so as not to impair the use of extradition as a preventive force and a remedy against terrorism.

V. CONCLUDING OBSERVATIONS

128. Both the Commission and the Sub-Commission have requested the Special Rapporteur to address other issues related to terrorism that are best discussed here because they are actually means of reducing terrorism. Most of these issues relate directly to human rights and humanitarian law norms.

129. In reviewing contemporary terrorism, one might roughly observe that those States with the best human rights records are the States with the least likelihood of problems with domestic terrorism. Similarly, those States with international relationships that most conform to the goals and principles of the Charter are likely to be the States least affected by international terrorism. It follows that an obvious step to reduce terrorism is the full realization of human rights and the practice of genuine democratic processes throughout the world, among States and in every State. All efforts must be made to address better the realization of human rights, in particular in relation to self-determination, racism, internal ethnic and political representation, and class-based economic or cultural divisions in society.

130. Violations of human rights, humanitarian law and basic principles of the Charter, then, are among the major causal factors of terrorism. As noted earlier in this progress report, careful attention to causal factors of terrorism is one of the duties of all States regarding terrorism and human rights. The overall result of addressing causal factors could be a reduction in terrorist acts. Thus, rather than being viewed as "legitimizing" terrorist groups, as some States have suggested, careful study of causal factors should be an essential logical component of any plan to reduce terrorism, especially with regard to problem areas or situations in which terrorist acts occur with frequency.

131. The full realization of human rights also involves achievement of economic balance among States, including the right to development. In similar fashion, better efforts should be made to achieve improved relations between States, not only because this is mandated in the Charter, but also because it is viewed as essential to the global realization of human rights as indicated in article 28 of the Universal Declaration: quite clearly an international order that is generating terrorist acts hardly qualifies as a "social and international order in which the rights and freedoms set forth in th[e] Declaration can be fully realized".

132. In the course of her work, the Special Rapporteur became aware that the scale and scope of this topic is perhaps larger than other topics undertaken by the Sub-Commission. In this progress report, she has sought to provide more theoretical insight into some of the many complex issues relevant to the study on terrorism and human rights, giving attention to the issues raised by the Commission and Sub-Commission. However, limitations concerning the size of Sub-Commission reports have not made it possible to fully address all the issues that the Special Rapporteur believes should be included in this progress report.

133. There is much more that needs to be assessed concerning extradition in the context of terrorism. As already mentioned, the new regional conventions place great emphasis on extradition. The issue of a sovereign immunity defence when a State actor is charged with acts of State terrorism also deserves more attention, as it stands prominently before the international community in several cases recently or not yet resolved. The Special Rapporteur would also like

to review some ongoing or recently concluded cases relating to international terrorism and she considers that review of all the existing comprehensive regional instruments on terrorism would be very useful in the context of definition as well. Last but not least, she would like to complete her consideration of sub-State (or individual) terrorism and of the related question of the accountability of non-State actors before the final report.

134. In the light of her concerns about this array of topics that need more attention, the Special Rapporteur recommends that the Sub-Commission consider authorizing her to prepare a second progress report.

Notes

[1] The Special Rapporteur set out prior international action on terrorism in her working paper (E/CN.2/Sub.2/1997/28, para. 4) and in her preliminary report (E/CN.4/Sub.2/1997/27, paras. 6-13).

[2] As is well known, in the past the Security Council has dealt with the issue of international terrorism in individual cases only. The Security Council addressed the matter of international terrorism in general in a statement issued on the occasion of the Security Council Summit of 31 January 1992, in which the Members of the Security Council expressed their deep concern over acts of international terrorism and emphasized the need for the international community to deal effectively with all such acts (S/23500 of 31 January 1992).

[3] Earlier ad hoc committees established by the General Assembly with a view to studying or dealing with the fight, or with aspects of the fight, against international terrorism have been the Ad Hoc Committee on International Terrorism (General Assembly resolution 3034 (XXVII) of 18 December 1972) and the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages (General Assembly resolution 31/103 of 15 December 1976) both composed of 35 States. See also E/CN.4/Sub.2/1999/27, para. 11, and notes 10 and 11.

[4] See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Fourth session (14-18 February 2000) (A/55/37).

[5] Ibid., paras. 20-25.

[6] Ibid., para. 26.

[7] These are: Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (entered into force on 4 December 1969); Convention on the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (entered into force on 14 October 1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 (entered into force on 26 January 1973); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the

General Assembly of the United Nations on 14 December 1973 (entered into force on 20 February 1977); International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 (entered into force on 3 June 1983); Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980 (entered into force on 8 February 1987); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988 (entered into force on 6 August 1989); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 (entered into force on 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988 (entered into force on 1 March 1992); Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991 (entered into force on 21 June 1998); International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 (not yet in force); International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (not yet in force); Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998; Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999 (not yet in force); European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977 (entered into force on 4 August 1978); OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, concluded at Washington, D.C., on 2 February 1971 (entered into force on 16 October 1973); OAU Convention on the Prevention and Combating of Terrorism adopted at Algiers on 14 July 1999 (not yet in force); SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987 (entered into force on 22 August 1988); Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999 (entered into force on the date of its signature for those of the Parties whose legislation does not require completion of domestic procedures).

[8] See Report of the Working Group (A/C.6/55/L.2 of 19 October 2000).

[9] European Parliament, resolution A5-0050/2000 of 16 March 2000.

[10] Ibid., paras. 41-42.

[11] See A/54/917-S/200/580, annex.

[12] See A/54/637-S/1999/1204 of 11 October 2000.

[13] OIC, Ninth Summit Conference (Qatar, 2000), Doha Declaration.

[14] See E/CN.4/Sub.2/1999/27, paras. 7-12 and 41-42 and E/CN.4/Sub.2/1997/28, paras. 11 and 17.

[15] See, for instance, A.P. Schmid, Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature, Amsterdam, North-Holland Publishing Co., 1983, pp. 119-152, who compiled 109 definitions of terrorism, and J.F. Murphy, "Defining international terrorism: a way out of the quagmire", Israel Yearbook on Human Rights, vol. 19 (1989), p. 13, referring to another leading commentator on terrorism, Walter Laqueur, who had pointed out that between 1936 and 1981, 109 different definitions of terrorism were advanced, and more since then, including a half dozen provided by the United States Government, each one different from the other.

[16] J.J. Lambert, Terrorism and Hostages in International Law, Cambridge, Grotius Publications Ltd., 1990, p. 13.

[17] See, for example, G. Guillaume, "Terrorisme et droit international", Collected Courses of The Hague Academy of International Law, vol. 215 (1989-III), p. 295, and G. Wardlaw, Political Terrorism: Theory, tactics, and counter-measures, Cambridge, Cambridge University Press, 1982, pp. 4-5.

[18] E/CN.4/Sub.2/1997/28, para. 17.

[19] E/CN.4/Sub.2/1999/27, para. 43.

[20] Ibid., para. 42.

[21] E/CN.4/Sub.2/1997/SR.33, para. 68.

[22] E/CN.4/Sub.2/1999/SR.33, para. 72.

[23] E/CN.4/Sub.2/1997/SR.34, para. 22. Cf., however, the same expert in E/CN.4/Sub.2/1996/SR.35, para. 11, and see also E/CN.4/Sub.2/1999/SR.27, para. 71, where the same expert, recognizing the difficulty of definition, expresses satisfaction that the Special Rapporteur envisages only provisional definitions and just "for the purposes of this study".

[24] E/CN.4/Sub.2/1999/SR.26, para. 56.

[25] E/CN.4/Sub.2/1997/SR.33, para. 40.

[26] E/CN.4/Sub.2/1999/SR.26, para. 66.

[27] See, for instance, Mr. I. Maxim and Mr. M. Alfonso Martínez in E/CN.4/Sub.2/1997/SR.33, paras. 44 and 76-77 respectively.

[28] Mr. H. Fix Zamudio, ibid., para. 42.

[29] Mr. M. Bossuyt, ibid., para. 48.

[30] Mr. M. Bossuyt in E/CN.4/Sub.2/1999/SR.26, para. 66.

[31] Mr. S. Sorabjee in E/CN.4/Sub.2/1999/SR.27, para. 82.

[32] Ms. F. Hampson, ibid., paras. 23-25.

[33] Mr. R.K.W. Goonesekere, ibid., para. 78.

[34] Mr. A. Eide in E/CN.4/Sub.2/1999/SR.30, para. 39.

[35] Ms. H. Warzazi in E/CN.4/Sub.2/1995/SR.11, para. 41.

[36] See Lambert, note 16 supra, p. 13, Wardlaw, note 17 supra, pp. 4-5 and R.E. Rubenstein, Alchemists of Revolution: Terrorism in the Modern World, New York, Basic Books Inc., 1987, p. 17.

[37] Supra, note 3.

[38] See also F.J. Hacker, Crusaders, Criminals, Crazies: Terror and Terrorism in Our Time, New York, W.W. Norton and Co., 1976, using the terms "terror from above" and "terror from below", as cited by Wardlaw, note 17 supra, p. 69.

[39] A good historical overview of terrorism may be most conveniently found in R.A. Friedlander, Terrorism: Documents of International and Local Control, vol. I, New York, Oceana Publications, 1979, pp. 1 ff.

[40] See, for instance, Guillaume, note 17 supra, pp. 296-297, and see also the study prepared by the United Nations Secretariat for the Sixth Committee, under the title "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes" (A/C.6/418 of 2 November 1972).

[41] See paras. 51-67.

[42] See generally A. Soboul, The French Revolution 1787-1799, New York, Vintage, 1975.

[43] See generally W. Laqueur, Terrorism, Boston, Little, Brown and Company, 1977, pp. 11 ff.

[44] See generally Wardlaw, note 17 supra, pp. 25 ff., and W. Laqueur, The New Terrorism: Fanaticism and the Arms of Mass Destruction, Oxford, Oxford University Press, 1999, pp. 56 ff.

[45] For a distinction between the meaning of "terror" and "terrorism", see International Encyclopedia of Terrorism, Chicago and London, Fitzroy Dearborn Publishers, 1997, p. 13. See also Wardlaw, note 17 supra, pp. 9-13.

[46] Supra, para. 37. See also W.D. Purdue, Terrorism and the State. A Critique of Domination through Fear, New York, Praeger, 1989, p. 33 ff.

[47] Ibid., p. 38 ff. Alexander Solzhenitsyn, the expatriate Soviet writer, had argued that Joseph Stalin used the KGB and the bureaucracy (courts, prisons, etc.) to terrorize, purge and destroy over 15 million peasants, communists, prisoners of war and ethnic nationals. See L. Kuper, Genocide: Its Political Use in the Twentieth Century, New Haven, Yale University Press, 1982, p. 141.

[48] See generally International Encyclopedia of Terrorism, note 45 supra, p. 102 ff., as well as Perdue, note 46 supra, p. 36 ff. And see also Department of State, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (1949), p. 4: "The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror".

[49] International Encyclopedia of Terrorism, note 45 supra, pp. 688-689. See also Amnesty International, Political Killings by Governments, London, Amnesty International, 1983, p. 44.

[50] International Encyclopedia of Terrorism, note 45 supra, pp. 686-687.

[51] See generally J. Simpson and J. Bennett, The Disappeared and the Mothers of the Plaza, New York, St.Martin's Press, 1985, and also the Introduction by M. Stohl and G. A. Lopez, in M. Stohl and G.A. Lopez, eds., The State as Terrorist. The Dynamics of Governmental Violence and Repression, Westport, Conn., Greenwood Press, 1984, p. 4.

[52] Supra, note 38.

[53] See, for instance, the introductory remarks by Professor C. Bassiouni, Chairman of the Panel on "Human Rights v. New Initiatives in the Control of Terrorism", in American Society of International Law: Proceedings of the 79th Annual Meeting, New York, 1985, p. 289.

[54] See Guillaume, note 17 supra, p. 298. But see also the third preambular paragraph, and article 30 of the Universal Declaration of Human Rights. Perdue, note 46 supra, pp. 17-19, referring to Max Weber's theory of legitimation founded in a rational-legal basis for rule, exemplified by a system of laws and embodied in bureaucratic forms of administration,

perceives the relationship between terrorism and the modern State within a critique of the Weberian thought and assumes that State power may be used quite "systematically" to maintain an order of inequality with not only domestic but global dimensions.

[55] See generally R. Falk, Revolutionaries and Functionaries, New York, E.P. Dutton, 1988.

[56] Lambert, note 16 supra, p. 15, footnote 13.

[57] The domestic jurisdiction provision of the Charter of the United Nations stipulates: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."

[58] See, for instance, M.N. Shaw, International Law, 4th ed., Cambridge, Cambridge University Press, 1997, p. 202.

[59] The International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights), the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms are but a few outstanding examples of this evolution.

[60] Shaw, note 58 supra, p. 204.

[61] Guillaume, note 17 supra, p. 298.

[62] Ibid., p. 299.

[63] See H.-P. Gasser, "Prohibition of terrorist acts in international humanitarian law", Extract from the International Review of the Red Cross, 1986, pp. 6-7.

[64] See, for instance, Prosecutor v. Dusko Tadic a/k/a "Dule", Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141, as well as Prosecutor v. Dusko Tadic, Judgement of 15 July 1999 of the Appeals Chamber, para. 251, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, affirming that, under customary international law, crimes against humanity may also be committed in times of peace.

[65] See M. Crenshaw and J. Pimlott, eds., Encyclopedia of World Terrorism, vol. I, New York, Sharpe Reference, 1997, p. 206.

[66] See also Lambert, note 16 supra, p. 19.

[67] Encyclopedia of World Terrorism, vol. I, note 65 supra, p. 206.

[68] For instance, after the reunification of Germany in 1990, evidence emerged that leftist terrorists had received extensive training in East German camps. In these facilities, recruits were trained in the use of small arms and explosives, in intelligence-gathering, surveillance and mission-planning techniques. See International Encyclopedia of Terrorism, note 45 supra, p. 681.

[69] W. Laqueur, The Age of Terrorism (1987), pp. 268-269, as quoted by Lambert, note 16 supra, p. 19 and note 33.

[70] See, for instance, Nonviolent Responses to Violence-Prone Problems: The Cases of Disputed Maritime Claims and State-Sponsored Terrorism, Reports of Two Special Committees of the American Society of International Law, Studies in Transnational Legal Policy No. 22, Washington, D.C., The American Society of International Law, 1991 p. 18 ff., and Encyclopedia of World Terrorism, vol. I, note 65 supra, pp. 206-207.

[71] See generally, Non-violent Responses to Violence-Prone Problems, note 70 supra, pp. 18-19; G. Wardlaw, Political Terrorism: Theory, Tactics and Countermeasures, 2nd revised ed., Cambridge, Cambridge University Press, 1989, p. 175 ff., M. Stohl, "International dimensions of State terrorism", in Stohl and Lopez, note 51 supra, pp. 43-58; W. Laqueur, "Reflections on terrorism", Foreign Affairs, 1986, Fall, vol. 65, pp. 86-100; P. Wilkinson "State-Sponsored international terrorism: the problems of response", The World Today, 1984, July, pp. 292-298.

[72] See, for instance, Laqueur, note 44 supra, p. 156 ff.

[73] See International Encyclopedia of Terrorism, note 45 supra, p. 677.

[74] Ibid.

[75] See B. M. Jenkins, New Modes of Conflict, Santa Monica, California, RAND Publications Series R-3009-DNA, 1983, p. v. In this quasi-official publication of the RAND Corporation, the prominent expert on terrorism from the RAND refers to "indirect forms of warfare" as follows: "Indirect forms of warfare include clandestine and covert military operations carried out by other than the regular armed forces of a nation, providing asylum and support for guerrillas in an adjacent country, providing support - and sometimes operational direction - to terrorist groups opposing a rival or enemy regime, and governmental use of terrorist tactics, such as assassinating foreign foes or troublesome exiles".

[76] See, for instance, P. Wilkinson, Terrorism and the Liberal State (2nd ed.), London, Macmillan, 1986, p. 277 ff., and Lambert, note 16 supra, p. 20.

[77] J.F. Murphy, State Support of International Terrorism: Legal, Political and Economic Dimensions, Boulder, Colorado, Westview Press, 1989, p. 36, who continues (p. 37) with a reference to "low-intensity conflict" defined by the United States Army, as follows: "a broad term describing political-military struggle short of conventional warfare between national armed forces, to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psycho-social pressures through terrorism to insurgent war".

[78] See, for instance, Wardlaw, note 71 supra, p. 182 ff.

[79] Ibid., as well as Falk, note 55 supra, pp. 136-137.

[80] Wardlaw, note 71 supra, p. 175.

[81] For example, former United States Under-Secretary of State G. Ball, in "Shultz is wrong on terrorism", The Gainesville Sun, 27 December 1984, p. 11A, made the following point: "States sponsored terrorism menaces the whole international order, and if we are to maintain even minimum world stability we must ostracize any nation condoning it. Meanwhile, let us take care that we are not led, through panic and anger, to embrace counterterror and international lynch law and thus reduce our nation's conduct to the squalid level of the terrorists". Cited in C.W. Kegley, Jr., T. Vance Sturgeon and E.R. Wittkopf, "Structural terrorism: the systemic sources of State-sponsored terrorism", in M. Stohl and G.A. Lopez, Terrible Beyond Endurance? - The Foreign Policy of State Terrorism, New York, Greenwood Press, 1988, p. 27.

[82] For poignant cautions against overreacting to State-sponsored terrorism, see generally, Falk, note 55 supra and Wardlaw, note 71 supra, passim.

[83] For such a discussion see, for instance, Nonviolent Responses to Violence-Prone Problems, note 70 supra, p. 24 ff., and Murphy, note 77 supra, pp. 55-111. And see also, more generally, Guillaume, note 17 supra, pp. 373-406.

[84] See paras. 7, 38-39 of the preliminary report of this Special Rapporteur (E/CN.4/Sub.2/1999/27). See also the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits Judgment, I.C.J. Reports 1986, in which the International Court of Justice acknowledged the customary international law quality and characteristics of this instrument (paras. 188, 191-192). Furthermore, while terrorism was not the focus of the proceedings before it, some of the conclusions reached by the Court are very relevant, albeit indirectly, to the issue of State-sponsorship of terrorism. For example, the Court held that the United States by its assisting the contras, where its activities involved a threat or use of force, and by "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua", had violated its customary international law obligations not to use force against another State and not to intervene in the affairs of another State (paras. 228, 238 and 292).

[85] It is interesting to note that international agreement on the principle that States have a responsibility not to conduct, support or encourage terrorist activity against other States had already been reached in the framework of the League of Nations. See article I of the abortive Convention for the Prevention and Punishment of Terrorism, adopted on 16 November 1937 under its auspices (League of Nations document c. 546 (I). M. 383 (I). 1937. v). Moreover, in 1934 the Council had resolved that States had the duty not to encourage or tolerate in their territory terrorist activity directed against other States. See 1934 League of Nations Official Journal 1839, mentioned in Lambert, note 16 supra, p. 29, note 82. Such prohibitions are also contained in article 3 (f) and (g) of General Assembly resolution 3314 (XXIX) of 14 December 1974 containing a Definition of Aggression, as well as in General Assembly resolution 2734 (XXV) of 16 December 1970, on the Declaration on the Strengthening of International Security, which "[s]olemnly reaffirms ... that every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State".

[86] See also Guillaume, note 17 supra, p. 299.

[87] Stohl, note 71, supra, p. 43.

[88] Ibid., p. 44 ff., Kegley, Vance Sturgeon and Wittkopf, note 81 supra, p. 22 ff. See also Lambert, note 16 supra, p. 16, and Falk, note 55 supra, pp. 170-171.

[89] Official Records of the General Assembly, Twenty-Eighth Session, Supplement No. 28 (A/9028), 1973, para. 24. See also ibid., para. 38 and T.M. Franck and B.B. Lockwood, Jr., "Preliminary thoughts towards an international convention on terrorism", The American Journal of International Law, vol. 68 (1974), pp. 73-74.

[90] Lambert, note 16 supra, p. 16.

[91] Ibid., referring also to Stohl, note 71 supra, p. 48.

[92] A revealing example is the Rainbow Warrior incident, in which French intelligence agents engaged in an act of terrorism in the port of Auckland, New Zealand, in 1985, destroying the Greenpeace ship Rainbow Warrior, which was protesting French nuclear testing in the South Pacific. This act incidentally resulted in the death of a member of the crew. The Government of France issued an apology, eventually agreed to a mediation procedure, over which the United Nations Secretary-General presided, and accepted some financial responsibility for the death of the member of the crew.

[93] For a revealing example of this confusion, see the text accompanying note 89 supra.

[94] See generally, International Encyclopedia of Terrorism, note 45 supra; Friedlander, note 39 supra; R.H. Kupperman and D.M. Trent, eds., Terrorism: Threat, Reality, Response, Stanford, California, Hoover Institution Press, 1980; A.E. Evans and J.F. Murphy, eds., Legal Aspects of International Terrorism, Lexington, Massachusetts, Lexington Books, 1978; W.M. Reisman,

"International legal responses to terrorism", Houston Journal of International Law, vol. 22, No. 1 (1999), p. 50 ff, and Rubenstein, note 36 supra. See also Lambert, note 16 supra, p. 15; Stohl and Lopez, note 51 supra, p. 3; and Schmid, note 15 supra, pp. 104-105 who estimates that probably more than 90 per cent of the literature on terrorism is on non-State terrorism.

[95] Laqueur, note 69 supra, quoted by Lambert, note 16 supra, pp. 14-15, note 11.

[96] E/CN.4/Sub.2/1997/28, paras. 14-16; E/CN.4/Sub.2/1999/27, paras. 44-45.

[97] In practically all United Nations efforts to date, there is regular mention that armed conflict is not terrorism. For example, in the first report of the first Ad Hoc Committee on International Terrorism (note 89 supra, para. 37), there was mention that the Committee should not consider acts arising from armed conflict.

[98] See, for instance, E/CN.4/Sub.2/1997/28, para. 11.

[99] For example, in the OIC Convention, article 2 (a) provides: "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime". The OAU Convention sets out its parallel provision in its article 3, paragraph 1, as follows: "... the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces, shall not be considered as terrorist acts".

[100] The need to distinguish clearly between terrorism and national liberation struggles has been a dominant theme of the OIC especially, as set out above. The OIC has characterized the debates on this issue as "frantic attempts aimed at obliterating the clear distinction between terrorism and the legitimate struggle of peoples which conforms with the principles of international law and the provisions of the Charters of the Organisation of the Islamic Conference and the United Nations" (OIC resolution 53/8-P (IS)). In the resolution from the most recent Islamic Summit the term "frantic" has been changed to "rabid" (OIC resolution 64/9-P (IS)). See also generally E. Chadwick, Self-determination, Terrorism and the International Humanitarian Law of Armed Conflict, The Hague, Martinus Nijhoff, 1996.

[101] The main instruments of humanitarian law include: The Hague Convention and Regulations of 1907, 205 Perry's Treaty Series 277; The Geneva Conventions I-IV of 1949, 75 United Nations Treaty Series 31, 75 United Nations Treaty Series 85, 75 United Nations Treaty Series 135 and 75 United Nations Treaty Series 267 (the Geneva Conventions); Additional Protocol I to the Geneva Conventions of 1949, 1125 United Nations Treaty Series 3 (Additional Protocol I); Additional Protocol II to the Geneva Conventions of 1949, 1125 United Nations Treaties Series 609 (Additional Protocol II); the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 United Nations Treaty Series 73. There are also many resolutions of the General Assembly, primarily relating to the protection of civilians in armed conflicts, that are also part of the law of armed conflict.

[102] The International Court of Justice forcefully stressed the jus cogens obligation of all States and parties to respect and ensure respect for humanitarian law in all circumstances, including in situations in which a State is not directly involved. See Military and Paramilitary Action in and against Nicaragua, note 84 supra, paras. 113-115, and see also paras. 151-153 (Singh, separate opinion) and paras. 199-200 (Sette-Camara, separate opinion). The Court recognized also that this rule applies regardless of the type of armed conflict, having determined that the armed conflict between the contras and the Government of Nicaragua was a civil war, (ibid., para. 114), construing this principle in the light of provisions of humanitarian law governing civil wars.

[103] International armed conflicts have traditionally been viewed as being between two States. However, since the entry into force of Additional Protocol I to the Geneva Conventions, wars of national liberation and against racist regimes are now legally international armed conflicts. See Additional Protocol I, article 1. This article does not, regrettably, define a racist regime. However, there is a great deal of human rights law, including treaties, that could be used to determine whether a particular regime is sufficiently racist to allow application of humanitarian law to armed opposition, assuming that minimum civil war criteria are not met.

[104] Humanitarian law applies whether there is a declaration of war or not. Most contemporary wars are fought with no declaration.

[105] This article is universally accepted as a statement of the existing customary international law definition of civil war.

[106] Additional Protocol II, article 1.2.

[107] Under humanitarian law, civil wars do not have to be "justified" - they may be fought for any reason whatsover. The essential is whether the level of armed activity rises to civil war criteria. Guerrilla warfare also is not prohibited in the laws and customs of war. See generally M. Veuthey, Guérilla et droit humanitaire, Genève, Comité International de la Croix-Rouge, 1983.

[108] The Special Rapporteur has found useful in this regard an annual review of wars (undertaken since 1995) by K. Parker, A. Heindel, and A. Branch, Armed Conflict around the World Today: A Country by Country Review, Humanitarian Law Project/Parliamentary Human Rights Group, United Kingdom. Also available at www.hri.ca/doccentre/armedconflict.

[109] It will be recalled that article 1.4 of Additional Protocol I provides for the application of humanitarian law governing international wars in situations "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." Indeed, there is rarely controversy regarding application of humanitarian law when there is no self-determination issue involved.

[110] The Statutes of the International Tribunals for the former Yugoslavia and Rwanda provide a useful guide to what are now considered serious violations of the laws and customs of war. The four "grave breach" articles in the 1949 Geneva Conventions (First Convention, article 50; Second Convention article 51; Third Convention, article 130; Fourth Convention, article 147) and the two Additional Protocols also identify those acts in armed conflicts that constitute serious violations.

[111] It should be noted that the Geneva Conventions contain a number of provisions mandating action in the case of violations, for example articles 129 to 132 of the Third Geneva Convention, which are repeated in similar articles in each of the other three conventions. The General Assembly has also addressed the enforcement of humanitarian law. See especially, Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, proclaimed by the General Assembly in resolution 3074 (XXVIII) of 3 December 1973.

[112] There are also efforts in Cambodia and Indonesia to institute internal proceedings against those accused of war-time offences in which international observers may participate. In a number of countries, there have been general amnesties for both sides in civil wars where serious violations occurred on both sides.

[113] See, Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9). There are now only 27 of the required 60 ratifications for the treaty to enter into force. Even so, the Preparatory Committee has completed work on the elements of genocide, war crimes and crimes against humanity (see PCNICC/2000/1/Add. 2).

[114] See, for example, article 49 of the First Geneva Convention of 1949. The same article is set out with exactly the same language in the three other Geneva Conventions of 1949.

[115] Frequently the occupying States label even such internationally protected acts as peaceful protest or the provision of humanitarian aid, as terrorist acts.

[116] It is clear that, under humanitarian law rules, considerably less armed conflict (or indeed none at all) is necessary to invoke humanitarian law when there is a claim of self-determination, which is perhaps why so many groups seek to invoke it.

[117] Especially after March 1995 - when members of the Japanese cult, Aum Shinrikyo, dispersed sarin nerve gas in the Tokyo subway - the idea that terrorism is likely to escalate to new, monstrous proportions by resorting to the use of unconventional weapons has gained increased popularity among writers. See generally, B. Roberts, ed., Terrorism with Chemical and Biological Weapons: Calibrating the Risks and Responses; Alexandria, Virginia, The Chemical and Biological Arms Control Institute, 1997; J.K. Campbell, Weapons of Mass Destruction Terrorism, Seminole, Florida, Interpact, 1997; E.M. Spiers, "Chemical and biological terrorism", in Brassey's Defence Yearbook 1996, London and Washington, Brassey's, 1996, pp. 254-272; B. Hoffman, Inside Terrorism, New York, Columbia University Press, 1998; B. Hoffman, "Terrorism and the WMD: some preliminary hypotheses", The Nonproliferation Review, Spring-Summer 1997, pp. 45-53; Laqueur, op. cit., note 44 supra; W. Laqueur, "Postmodern

terrorism", Foreign Affairs, Sep/Oct 1996, pp. 24-36; A. Carter, J. Deutch and P. Zelikow, "Catastrophic terrorism: tackling the new danger", Foreign Affairs, Nov/Dec 1998, pp. 80-94; J. Stern, The Ultimate Terrorists, Cambridge, Harvard University Press, 1999; G. Schweitzer, Superterrorism: Assassins, Mobsters and Weapons of Mass Destruction, New York, Plenum Press, 1998.

[118] For similar conclusions see, for example, A. E. Smithson and L.-A. Levy, Ataxia: The Chemical and Biological Terrorism Threat and the US Response, Report No. 35, The Henry L. Stimson Center, Washington, 2000; E. Sprinzak, "The great superterrorism scare", Foreign Policy, Fall 1998, pp. 110-124; B.M. Jenkins, "Will terrorists go nuclear?", Orbis, Autumn 1985, pp. 507-515; B.M. Jenkins, "The limits of terror: constraints on the escalation of violence", Harvard International Review, Summer 1995, p. 44; D. Claridge, "Exploding the myths of superterrorism", in M. Taylor and J. Horgan, eds., The Future of Terrorism, London, Frank Cass, 2000, pp. 133-148.

[119] For particularly gruesome worst-case scenarios see, for example, Carter and others, note 117 supra, p. 81 and Stern, note 117 supra, pp. 1-4.

[120] For accessible technical accounts of chemical weapons, see Smithson and Levy, note 118 supra, p. 29; J. B. Tucker, ed., Toxic Terror: Assessing Terrorist Use of Chemical and Biological Weapons, Monterey Institute of International Studies, Cambridge, Massachusetts, MIT Press, 2000, pp. 3-6; Stern, note 117 supra, p. 167. For a more rigorously technical account, see US Congress, Office of Technology Assessment, Technologies Underlying Weapons of Mass Destruction, OTA-BP-ISC-115, US Government Printing Office, Washington, D.C., December 1993.

[121] Laqueur, note 44 supra, p. 59; Smithson and Levy, note 118 supra, p. 29.

[122] See, for instance, Spiers, note 117 supra, pp. 257 and 263, as well as Smithson and Levy, note 118 supra, p. 31, for a chart of commercial applications of chemical weapon precursors.

[123] Ibid., p. 32.

[124] R. A. Falkenrath, R.D. Newman, and B.A. Thayer, America's Achilles' Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack, Cambridge, Massachusetts, MIT Press, 1998, p. 102.

[125] See generally A.E. Smithson, Separating Fact from Fiction: The Australia Group and the Chemical Weapons Convention, Washington, D.C., Henry L. Stimson Center, 1997.

[126] See Tucker, note 120 supra, pp. 6-9; Smithson and Levy, note 118 supra, p. 36.

[127] See R. A. Falkenrath, "Confronting nuclear, biological, and chemical terrorism", Survival, vol. 40, No. 3, Autumn 1998, pp. 43-65.

[128] See Spiers, note 117 supra, p. 258. See also Smithson and Levy, note 118 supra, p. 34, mentioning that, released outdoors, 220 pounds of sarin would be necessary to kill 500 people, and 2,200 pounds to kill 10,000 people.

[129] Ibid., p. 279. See also Claridge, note 118 supra, p. 139 ff.

[130] For analyses of Aum Shinrikyo's experiences with chemical and biological weapons, see D.E. Kaplan, "Aum Shinrikyo", in Tucker, note 120 supra, pp. 207-226, Smithson and Levy, note 118 supra, pp. 71-111; D. E. Kaplan and A. Marshall, Cult at the End of the World, New York, Crown Publishers, 1996. See also R.J. Lifton, Destroying the World to Save It: Aum Shinrikyo, Apocalyptic Violence and the New Global Terrorism, New York, Metroplitan Books, 1999.

[131] Kaplan, note 130 supra, pp. 209-210; Stern, note 117 supra, p. 65.

[132] Smithson and Levy, note 118 supra, p. 281.

[133] Among the many sources, see the special issue of the Journal of the American Medical Association, 6 August 1997; United Nations, Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use, United Nations publication, Sales No. E.69.I.24, New York, 1969; World Health Organization, Health Aspects of Chemical and Biological Weapons, Geneva, 1970.

[134] The aforementioned Australia Group is attempting to institute export controls. See Smithson and Levy, note 118 supra, p. 40. See also Claridge, note 118 supra, pp. 139-140.

[135] Smithson and Levy, note 118 supra, pp. 45-50; Laqueur, note 44 supra, p. 55.

[136] See, for instance, D.A. Henderson, "Bioterrorism as a public health threat", Emerging Infectious Diseases, vol. 4, No. 3, Jul-Sept 1998, pp. 488-492, and Journal of the American Medical Association, note 133 supra, passim.

[137] Smithson and Levy, note 118 supra, pp. 51-56; Tucker, note 120 supra, pp. 6-9.

[138] Falkenrath, note 127 supra; p. 47; Stern, note 117 supra, p. 68.

[139] Laqueur, note 44 supra, p. 67.

[140] Stern, note 117 supra, p. 60, mentions that in 1997, General Aleksandr Lebed stated that 84 of 132 two-kiloton-yield suitcase bombs were unaccounted for. See also, generally, G. Cameron, Nuclear Terrorism: A Threat Assessment for the 21st Century, London, Macmillan Press Ltd., 1999.

[141] See, for instance, G.T. Allison, and others, Avoiding Nuclear Anarchy: Containing the Threat of Loose Russian Nuclear Weapons and Fissile Material, Cambridge, Massachusetts, MIT Press, 1996, and Stern, note 117 supra, pp. 87-106.

[142] Ibid., pp. 57-60, 97; by definition, weapons-grade uranium is enriched to more than 90 per cent U-235, and weapons-grade plutonium consists of less than 7 per cent Pu-240. See also Cameron, note 140 supra, pp. 131-132.

[143] Stern, note 117 supra, p. 98, writes: "no single known case has involved enough material to make a bomb". In Allison and others, note 141 supra, p. 10, it is stated: "literally hundreds of incidents have been reported, but the vast majority of the known incidents have been hoaxes or have not involved weapons-useable materials."

[144] Ibid., p. 13: "The question some people do ask, however, is whether there is a demand for stolen or illicitly purchased fissile material or nuclear weapons. So far, there is little hard evidence to prove the existence of this special form of nuclear-weapons demand."

[145] Stern, note 117 supra, p. 59.

[146] Ibid., pp. 54-57, 67; Falkenrath, note 127 supra, p. 62. In the most famous case of a threat of radiological terrorism, on 23 November 1995, Chechen guerrilla leader, Shamyl Basayev, buried a 32 kilo case of radioactive caesium in Izmailovski Park in Moscow, threatening to plant more; see Stern, note 117 supra, p. 67, and Cameron, note 140 supra, pp. 143-144.

[147] Ibid., pp. 133-135, Stern, note 117 supra p. 100; Laqueur, note 44 supra, p. 72.

[148] See, for example, Smithson and Levy, note 118 supra, pp. 11-13; and Sprinzak, note 118 supra, passim. See also note 117 supra.

[149] Stern, note 117 supra, p. 88.

[150] B.M. Jenkins, "Will terrorists go nuclear? A reappraisal", in H.W. Kushner, ed., The Future of Terrorism: Violence in the New Millennium, London, SAGE Publications, 1998, p. 230.

[151] See, for instance, J. D. Simon, Terrorists and the Potential Use of Biological Weapons: A Discussion of Possibilities, U.S. Armed Forces Medical Intelligence Center, RAND Corporation, Santa Monica, California, 1989, pp. 11-12.

[152] See generally Stern, note 117 supra; Laqueur, note 44 supra; and Hoffman, note 117 supra.

[153] Ibid., passim; E. M. Spiers, Weapons of Mass Destruction: Prospects for Proliferation, New York, St. Martin's Press, 2000, pp. 81-82; Simon, note 151 supra, p. v; Tucker, note 120 supra, p. 10; Laqueur, note 44 supra, passim; Cameron, note 140 supra, passim.

[154] Smithson and Levy, note 118 supra, p. 64.

[155] Ibid., pp. 57-69.

[156] See Sprinzak, note 118 supra, p. 116; Tucker, note 120 supra, p. 254.

[157] See Wardlaw, note 71 supra, p. 197, and cf., for example, the declaration by President Clinton of a state of national emergency regarding the proliferation of WMD, contained in Presidential Decision Directive 39: "The United States shall give the highest priority to developing effective capabilities to detect, prevent, defeat and manage the consequences of nuclear, biological, or chemical (NBC) materials or weapons use by terrorists", cited by J. M. Graham, "Introduction", pp. 9-20, in D.W. Siegrist and J. M. Graham, eds., Countering Biological Terrorism in the US: An Understanding of Issues and Status, Arlington, VA, Oceana Publications Inc., 1999, p. 10. See also, The White House, Office of the Press Secretary, 22 January 1999, "Remarks by the President on keeping America secure for the 21st Century", containing President Clinton's statement on new initiatives to address terrorism and the new terrorist-emerging tools and threats, as well as "Press briefing by Attorney-General Janet Reno, Secretary of HHS Donna Shalala, and Richard Clarke, President's National Coordinator for Security Infrastructure and Counter-terrorism", on the expansion of the United States Administration's efforts to combat the emerging threats of biological, chemical and cyber-terrorism. Cf., further, B. Kellman, "Review essay: clashing perspectives on terrorism", in The American Journal of International Law, vol. 94 (2000), pp. 434-438.

[158] See especially J. Arquilla, D. Ronfeldt, and M. Zanini, "Networks, netwar, and information-age terrorism", pp. 39-84 in Countering the New Terrorism, RAND Corporation, Santa Monica, 1999; J. Arquilla and D. Ronfeldt, The Advent of Netwar, RAND Corporation, Santa Monica, 1996; and J. Arquilla and D. Ronfeldt, eds., In Athena's Camp: Preparing for Conflict in the Information Age, RAND Corporation, Santa Monica, 1997. See also R.E. Stephens, "Cyber-biotech terrorism: going high tech in the 21st century", in Kushner, note 150 supra, pp. 195-207; and K.R. Damphousse and B.L. Smith, "The Internet: a terrorist medium for the 21st century", in Kushner, note 150 supra, pp. 208-224.

[159] See D. E. Denning, "Activism, hacktivism, and cyberterrorism: the internet as a tool for influencing foreign policy", paper presented at the Internet and International Systems: Information Technology and American Foreign Policy Decisionmaking Workshop, 1999, available at http://www.nautilus.org/info-policy/workshop/papers/denning.html; and M. M. Pollitt, Cyberterrorism - Fact or Fancy?, Proceedings of the 20th National Information Systems Security Conference, October 1997, pp. 285-289.

[160] See, for instance, Denning, note 159 supra, unpaginated.

[161] In her preliminary report, the Special Rapporteur aligns the human rights implications of terrorism into three conceptual clusters: (i) the right to life, liberty and dignity of the individual; (ii) issues relating to the right to a democratic society; and (iii) rights relating to social peace and public order.

[162] For instance, see the preliminary report submitted by Ms. Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences (E/CN.4/1995/42, especially paras. 99-101), and the update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/2000/21, para. 20).

[163] See, for example, Commission resolution 2000/45 of 20 April 2000, paragraphs 3 and 4, which affirm that violence against women, whether in public or private life, is a violation of the rights and fundamental freedoms of women.

[164] See, for example, Commission resolution 2000/30, seventeenth preambular paragraph: "Reiterating that all States have an obligation to promote and protect human rights and fundamental freedoms ...", and paragraph 5: "Urges States to fulfil their obligations under the Charter of the United Nations and other provisions of international law, in strict conformity with international law, including human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations ...".

[165] The need to address root causes of terrorism has also been raised at the Commission and Sub-Commission by both Governments and non-governmental organizations.

[166] For State responsibility if the State fails to protect an alien or if it fails to take appropriate action to pursue and punish those responsible for certain terrorist acts, see for instance, J.J. Paust, "The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility", Hastings International and Comparative Law Review, vol. 11, No. 1 (1987), pp. 53-54.

[167] See Commission resolution 2000/30, twentieth preambular paragraph and paragraphs 5 and 6, and Commission resolution 2001/37, twenty-second preambular paragraph and paragraphs 5 and 6.

[168] See, for instance, M. Gerber, "The Anti-Terrorism Act of 1987: sabotaging the United Nations and holding the Constitution hostage", New York University Law Review, vol. 65 (1990), at pp. 364-402; Coordinadora Nacional de Derechos Humanos, Grupo de Trabajo Juridico, En nombre de los inocentes: la legislacion sobre terrorismo y traicion a la patria: prepuesta de modificacion, Lima, 1993; J. Robert, "Terrorisme, idéologie sécuritaire et libertés publiques", Revue de droit public et de la science politique en France et a l'etranger, vol. 6 (1986), pp. 1651-1666.

[169] See, especially A/55/179 of 26 July 2000 and A/55/179/Add.1 of 9 October 2000.

[170] The Special Rapporteur notes that, in certain situations, persons charged with terrorist acts have fewer procedural rights than persons charged with war crimes or crimes against humanity.

[171] A/55/179, para. 44.

[172] Ibid., para. 45. Several States indicate that there is no separate criminal offence of terrorism but rather perpetrators are charged under ordinary penal law statutes for the actual act. However, the determination of terrorism can substantially alter a number of other provisions in the criminal justice system.

[173] It is also important to point out that these practices and policies have all contributed to the failure to resolve the underlying situations in which they arise - some of them unresolved for decades.

[174] In addition to the resolutions on human rights and terrorism adopted by the Commission, there has been much attention to impunity in the general debates, as indicated by the number of statements by both government and NGO speakers on this topic.

[175] Question of the impunity of perpetrators of violations of human rights (civil and political), final report submitted by Louis Joinet (E/CN.4/Sub.2/1997/20) and Question of the impunity of perpetrators of violations of human rights (economic, social and cultural), final report submitted by El-Hadji Guissé (E/CN.4/Sub.2/1997/8). Mr. Joinet's report includes a set of principles to combat impunity which is especially relevant in this regard.

[176] See chapter II, B.3. and C., supra. For an interesting discussion of the question of State immunity in the light of the decision of the British House of Lords in the case against General Pinochet, see J.M. Sears, "Confronting the 'culture of impunity': immunity of heads of State from Nuremberg to ex parte Pinochet", in the German Yearbook of International Law, vol. 42 (1999), pp. 125-146.

[177] The Special Rapporteur must emphasize, however, that an asylum-seeker would, if alleged to have committed a terrorist act, have the right to refute that charge.

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OTHER ISSUES

Promotion and consolidation of democracy

Working paper by Mr. Manuel Rodriguez Cuadros on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, in accordance with the mandate contained in decision 2000/116 of the Sub-Commission on the Promotion and Protection of Human Rights

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I. INTRODUCTION

1. At its fifty-second session, the Sub-Commission on the Promotion and Protection of Human Rights approved decision 2000/116 entrusting me with the task of preparing a working paper on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, taking into account the terms of Commission on Human Rights resolution 2000/47, for submission to the Sub-Commission at its fifty-third session.

2. Commission on Human Rights resolution 2000/47 on promoting and consolidating democracy calls upon States to consolidate democracy through the promotion of pluralism, the protection of human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections. It also contains a series of recommendations to States to take steps to promote, protect and respect all human rights and fundamental freedoms; to strengthen the rule of law; to develop, nurture and maintain an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections; and to strengthen democracy through good governance of public affairs, by improving the transparency of public institutions and policy-making procedures and enhancing the accountability of public officials, by promoting sustainable development and by enhancing social cohesion and solidarity.

3. The concepts and norms of the Commission's resolution 2000/47 are related to those of its earlier resolution 1999/57, of 27 April 1999, on promotion of the right to democracy, which is significant because it was the first text approved in the United Nations that recognized the existence of a right to democracy. Referring to developments in international law related to the recognition of democracy as a value under international protection and to its interdependence with human rights, resolution 1999/57 recalls that the large body of international law and instruments, including the resolutions of the Commission on Human Rights and those of the General Assembly, confirm "the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society".[1]

4. This appreciation of the development of international law linked to democracy as a system of government that allows the realization of human rights is followed by the recognition that the right to development and the principle of the right of self-determination of peoples are concepts that are mutually interdependent with democracy and human rights.

5. Among the components of the right to democracy, resolution 1999/57 recognizes that the rights of democratic governance include, inter alia, the following: (a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the right to freedom to seek, receive and impart information and ideas through any media; (c) the rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the right of political participation, including equal opportunity for all citizens to

become candidates; (f) transparent and accountable government institutions; (g) the right of citizens to choose their governmental system through constitutional and other democratic means; and (h) the right to equal access to public service in one's own country.

6. With regard to the competence and responsibilities of United Nations bodies related to the promotion and protection of human rights, Commission on Human Rights resolution 1999/57 requests the Office of the United Nations High Commissioner for Human Rights to continue and expand its programmes and projects of technical cooperation to promote democracy and the rule of law and to give priority assistance to such programmes. It also requests human rights treaty bodies and the human rights mechanisms of the Commission and Sub-Commission to pay due attention, within their mandates, to those elements of democratic governance outlined earlier.

7. The mandate received from the Sub-Commission to prepare this working paper is set against that normative background, more specifically the provisions of paragraph 1 of resolution 2000/47 and the provisions of Commission resolution 1999/57.

8. In the light of the above, the purpose of the working paper I submit herewith for the Sub-Commission's consideration at its fifty-third session is to present an ordered, preliminary outline of the current normative and practical development of international protection of democracy and the ways it is dealt with in universal and regional, legal and political instruments, with an emphasis on mechanisms of institutional and collective action for its promotion, consolidation and preservation. Since this is an introductory paper, giving only a general outline of a complex, diversified subject, the individual topics it covers have not been dealt with in any great depth. In the event of a final report, both the basic scheme of analysis and the analytical treatment of each topic would of course need to be perfected, expanded and treated in greater detail.

II. HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW

9. In the modern world, human rights constitute a system of values and international law which is universal in scope. The doctrine of human rights, from an axiological point of view, rests on the consideration that the human condition and human dignity entitle the individual to a set of essential rights. From the point of view of political theory, this set of human rights is worked out in the sphere of relations between the State and the individual, on the assumption that legitimate State action, which is derived from an act of popular sovereignty, must recognize and guarantee the enjoyment of the fundamental freedoms and human rights of individuals. There is a clear and definite limit to the jurisdictional exercise of State power, especially in the personal sphere, which is the respect of and non-interference with the exercise of fundamental freedoms and human rights. From the point of view of the State's responsibility, however, the doctrine of human rights presupposes not only a duty not to act, to abstain, or not to interfere, but also the exercise of a duty to guarantee.

10. Thus the legal relation between the State and the individual rests essentially on the non-interference by the power of the State with the enjoyment of fundamental rights and on the exercise by the State of the duty to guarantee. With the establishment of second-generation rights, not only individuals are recognized as the holders of rights, but also groups of individuals, following the introduction of a collective entitlement to certain human rights in positive law.

At the same time, the State assumes obligations to act. Economic, social and cultural rights, like credit rights, are also part of the legal relation between the State and the individual and between the State and the national community.

11. In this context, relations between the State and the individual and the State and the national community, from a legal point of view and from the point of view of the exercise of political power, are determined by the structure of the State and the political system.

12. If the enjoyment of human rights depends on their recognition and guarantee by the State and the political system, and if the exercise of human rights, whether individual or collective, requires a State structure and a political system which does not interfere with first-generation rights and which promotes the realization of second-generation rights, then the link between human rights and the political system of government is one of mutual interdependence. It is in this setting, that is, of the effectiveness of the State structure and the political system of government in guaranteeing the free exercise and enjoyment of human rights, that the interrelationship between democracy and human rights is played out.

13. Regardless of the debate about its definition and scope, democracy has a basis with regard to which, at least in the sphere of constitutional and international law, there is universal consensus. This underlying concept of democracy is the principle of the self-determination of peoples as the expression of popular sovereignty. If the people holds the constituent power of any political system, the latter must ensure that the people's sovereignty in this sense always resides in democratic forms of the people's will. The protection of human rights and the exercise by the State of its duty of guarantee require that the established power (system of government or political system) should be exercised within precise, legally prescribed limits, so as not to interfere in the area of individual freedom enjoyed by citizens.

14. The rule of law, for its part, presupposes a form of organization, the basic characteristic of which is the limitation and control of authority, through the law, with the aim of safeguarding freedom.[2] From the political point of view, moreover, it entails basic principles aimed at ensuring that the people's sovereignty is never subdued by abuse of the State's authority. The rule of law requires at least three limitations on State authority: a material limitation, related to the respect for and guarantee of fundamental freedoms and human rights; a functional limitation, in the form of a division of powers; and a temporal limitation, expressed as the periodic renewal of the people's will through free and fair elections. In more specific terms, the rule of law means applying the principle of legality and constitutional rules, the separation of public powers, the recognition and safeguard of individual freedoms, civil, political, social, economic and cultural rights, administration of justice independent of the political power, control over the exercise of public authority, institutions that guarantee the enjoyment of fundamental freedoms and human rights, and the remedies of habeas corpus, amparo and the protection of citizens against administrative acts.

15. The rule of law provides the most advanced and functionally most effective form of organization for the enjoyment and protection of human rights. This mutually dependent relationship originated in the historic acceptance of human rights, with the recognition of the guarantee of due legal process and the independence of the system of justice as a universally recognized individual human right.

16. The basic elements of the rule of law are enshrined in the Universal Declaration of Human Rights. The Preamble to the Declaration establishes that human rights must be protected by the rule of law, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression. The expression "rule of law", in the context of the Universal Declaration, should be understood as a reference to a constitutional rule of law, whereby the powers and limits of governmental authority, as well as the rights and freedoms of citizens, are recognized and established in a legal corpus, which takes precedence over subordinate legislation, and whose approval or modification is subject to the sovereign will of the people.

17. Article 29, paragraph 2, of the Universal Declaration establishes that, in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Apart from recognizing the relation between the State and the individual as a link based on the free exercise of fundamental freedoms and human rights, this provision establishes precise limits on State action on the assumption that certain restrictions may justifiably be placed on the exercise of human rights, by their very nature, although such restrictions should be exceptional and temporary and should always be compatible with the principles and norms of a democratic society.

18. The Universal Declaration also refers to the independence of the administration of justice and the guarantees of due legal process which the State must ensure.[3] Article 8, which took its inspiration from the remedy of amparo introduced by the 1911 Mexican Constitution, gave universal effect to everyone's right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

19. The link between the rule of law and democracy was also established in the Universal Declaration, when it stated that the sovereignty of the people is the only legitimate source of governmental authority: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[4]

20. The International Covenant on Civil and Political Rights extends and develops the provisions linking human rights with the rule of law and democracy, especially with regard to the separation of powers, the independent administration of justice, the guarantees of due legal process and the provision of judicial remedies against any act by the State or State agents that is detrimental to individual freedoms and the human rights of persons. The provisions contained in articles 14 and 15 are particularly important in this respect. The Covenant also enshrines the right to electoral democracy by affirming the protection of political rights, in particular the right to take part in the conduct of public affairs, directly or through freely chosen representatives, the right to have access, on general terms of equality, to public service, and, in particular, the right for all "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[5]

21. The reference in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights to the elements that make up a democratic society, such as the limitation on any temporary restrictions which the law may impose on the exercise of fundamental rights and freedoms, recognizes the existence of a functional, normative and material interrelationship between the enjoyment of human rights and democratic society. Those instruments thus forbid any restriction on fundamental rights and freedoms arising from values, requirements or motives that are alien or contrary to a democratic society.

22. This interrelationship or relation of mutual dependence between human rights, the rule of law and democracy has also been given expression in the 1948 American Declaration of the Rights and Duties of Man (art. XXVIII), the Convention for the Protection of Human Rights and Fundamental Freedoms approved by the member States of the Council of Europe in 1950 (art. 11) and the American Convention on Human Rights, signed on 22 November 1969 (art. 29). In the judicial practice of the European Court of Human Rights and the Inter-American Court of Human Rights, the interrelationship between democracy and human rights has been legally established on the basis of the provisions set out in those instruments. In its Advisory Opinion OC-6/86 concerning the meaning of the word "laws" in article 30 of the American Convention on Human Rights, the Inter-American Court of Human Rights stated that the terms of the Convention should be interpreted within the context of the functional structure of the "democratic State". In its considerations concerning the scope of the expression "general welfare" as a legitimate basis for restrictions on specific rights and fundamental freedoms, the Inter-American Court stated that: "... it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual".[6]

23. The principle that human rights are realized within a democratic society was also maintained by the Inter-American Court in its judgements in the cases Velásquez Rodríguez/1968 (paras. 164-166) and Godínez Cruz/1989 (paras. 173-175). In those judgements, the Inter-American Court drew attention to the State's duty to be functionally organized so as to permit the realization of human rights in these terms: "The second obligation of the State parties is to 'guarantee' the free and full exercise of the rights recognized in the Convention for any person under their jurisdiction. This obligation implies that the States have a duty to organize the whole Government machinery and, in general, all structures through which the exercise of governmental authority is manifested, in such a way that they can legally ensure the free and full exercise of human rights."[7] The case-law of the European Court of Human Rights is similar.

24. The Universal Declaration of Human Rights and, subsequently, the Covenants, could not refer directly to democracy as a right, since any attempt to do so was thwarted by the ideological confrontation arising from the cold war. Those instruments opted instead to separate out the basic elements of the rule of law and democracy and to deal with them as separate rights, particularly the right to free and fair elections, citizens' access to the public service and the conduct of government on a non-discriminatory basis.

25. In the regional development of international human rights law, however, especially in the European and American systems, normative links between democracy and human rights became much more specifically established, even during the cold war period.

26. The Charter of the Organization of American States, approved in 1948, states in its article 3 (d) that "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."[8] In complementary fashion, the American Declaration of the Rights and Duties of Man, in its article XX, maintains that: "Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free."[9]

27. In those terms the inter-American system represents democracy as a common value, as a condition and as a system of government which must allow the realization of human rights, recognizing everyone's right to electoral democracy, on the basis of the periodic renewal of government authorities and the free and genuine exercise of the popular will in elections.

28. American international law has simultaneously developed principles and norms related to non-interference in internal affairs and self-determination. In theory, these would appear to contradict the obligation of OAS member States to be organized politically on the basis of representative democracy. This is not so, however, firstly because the rule which establishes the condition of a democratic and representative political system constitutes an international obligation agreed to in the free exercise of national sovereignty; and secondly because it expresses the dual character of the principle of self-determination, which has an internal component - in this case related to the sovereignty of the people expressed in free and genuine elections within democratic systems, which is raised to the status of an international undertaking - and an external component, related to non-interference by third countries in the internal affairs of an established democratic government.

29. In this way, the idea emerges in the OAS Charter that democracy in the inter-American system constitutes an international obligation. As the norms and institutions of the inter-American system have developed subsequently, especially after the cold war, the binding nature of the institution of democracy has gradually been refined until it has given rise to undertakings of collective action for the defence and preservation of democracy, including sanctions.

30. The Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Rome in 1950 by the member States of the Council of Europe, was also drafted on the assumption that the realization of human rights implies the existence of a democratic political system operating under the rule of law.

III. GRADUAL INTERNATIONALIZATION OF THE PROMOTION, CONSOLIDATION AND PRESERVATION OF DEMOCRACY

31. As the Secretary-General of the United Nations has noted: "Within the original framework of the Charter, democracy was understood as essential to efforts to prevent future

aggression, and to support the sovereign State as the basic guarantor of human rights, the basic mechanism for solving national problems and the basic element of a peaceful and cooperative international system."[10] This assumption was taken up as a much more explicit frame of reference in the Universal Declaration of Human Rights, and in General Assembly resolution 1514 (XV), which adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960.

32. These basic instruments of the United Nations were the initial points of reference upon which the Organization could base its action to promote democratic processes worldwide. However, their potential was held back by the nature of the ideological debate and the politics of the cold war. Consequently, for several decades United Nations efforts in the area of democracy focused almost exclusively on the promotion and protection of human rights, particularly following the signing of the Covenants and the development of United Nations protection machinery based on the Charter or on treaty provisions.

33. The end of the cold war brought with it a national and international environment more conducive for peoples to achieve their democratic aspirations. From the late 1980s, and especially from the start of the 1990s, there was a growing trend towards the universalization of democracy as a system of government, a social and political process and a value related to human rights.

A. The promotion of democracy and the holding of free and fair elections in United Nations practice

34. The Charter of the United Nations contains no direct reference to democracy. However, its provisions concerning the international trusteeship system (Chapter XII), and in particular Article 76 (b), aimed from the outset at the realization of democratic objectives, conceiving the trusteeship system within the broader objective of application of the principle of self-determination. The interpretation by the United Nations of Chapter XII of the Charter and its normative link with the principle of self-determination helped almost all the United Nations Trust Territories to gain access to independence.[11] In this practice, democratic processes were developed, with emphasis placed on the affirmation of fundamental freedoms, political rights (the right to citizenship, the right to vote), freedom of expression, freedom of the press and freedom of assembly, measures to combat discrimination on grounds of race, sex and religion, and recognition and promotion of the rights of women.[12]

35. From these limited beginnings, as an expression of advances in the process of democratization that took place from the end of the 1980s, in 1988 the United Nations began to adopt resolutions related to democracy and promotion of the principle of the holding of free, periodic and genuine elections.

36. The experience of the United Nations in electoral verification and observation began with its activities in the Trust and Non-Self-Governing Territories. A particular case was Namibia, a complex and large-scale process that culminated in the holding of free and fair elections, opening up the way for Namibia's independence. Verification and observation in Member States has its earliest antecedents in the United Nations mission sent to observe the plebiscite on the Panama Canal Treaties in October 1977, but elector observation and verification in the context

of democratic processes really began with the decision adopted by the Secretary-General pursuant to General Assembly resolution 43/24, establishing an agreement with the Nicaraguan Government to send a mission to observe the elections in Nicaragua. The United Nations Observer Mission for Verification of the Elections in Nicaragua (ONUVEN) had the following mandates: verifying that the political parties were equitably represented in the Supreme Electoral Council and its subsidiary organs; verifying that the political parties enjoyed full freedom to organize and mobilize without any form of hindrance or external influence; verifying that all political parties had fair access to State radio and television; verifying that electoral registers were properly drawn up; and the power to inform the Supreme Electoral Council of complaints received and of any irregularities or interference detected in the electoral process.[13]

37. Starting from this experience, and with the development of democratic processes in every region of the world, United Nations activities in observing and assisting elections have increased, and have gone beyond simply supervising events on the day of elections, shifting to the "consolidation of institutions and processes which are essential to viable democracies".[14]

38. In that context, since 1989 the United Nations has received more than 140 requests for electoral assistance. In 1992, pursuant to General Assembly resolution 46/137, electoral assistance activities were brought together under the electoral assistance unit, which was strengthened in 1994 and became the Electoral Assistance Division within the Department of Political Affairs.

39. The objectives of United Nations electoral assistance are basically twofold: (a) to assist Member States in their efforts to conduct legitimate democratic elections in accordance with the international criteria laid down by international and regional human rights mechanisms; and (b) to assist in institutional capacity-building to enable the countries concerned to organize democratic, genuine and periodic elections, enjoying the confidence and acceptance of the political parties and electorate.

40. But it is not only the Secretariat that is involved in electoral assistance activities, as practically all the organs of the system have gradually become involved. In particular, the Electoral Assistance Division coordinates its work with UNDP, the Department of Economic and Social Affairs, the Office for Project Services and the Office of the United Nations High Commissioner for Human Rights, also promoting the active participation of other civil society bodies and organizations that provide a source of external electoral assistance. Institutions that collaborate with the United Nations in electoral observation missions include the Commonwealth, the European Union, the Organization of African Unity, the Organization of American States, the Organization for Security and Cooperation in Europe, the Inter-Parliamentary Union, the Centre for Electoral Promotions and Assistance, the International Institute for Democracy and Electoral Assistance, the International Foundation for Electoral Systems, the National Democratic Institute for International Affairs and the Carter Center.

41. The characteristics and scope of electoral observation missions vary greatly, ranging from coordination and support of international missions, technical assistance to national electoral authorities, support for national electoral observers and limited observation, to the dispatch of electoral missions requiring a mandate from the General Assembly or Security Council.

The latter are on a larger scale, since they may involve the verification and supervision of the electoral process and even the whole organization and management of that process. Such verification missions, usually linked with peacekeeping operations, have been conducted in Angola, El Salvador, Eritrea, Haiti, Liberia, Mozambique, Nicaragua and South Africa, amongst others.

42. With the increase in and growing demand for electoral assistance, the United Nations has been able to improve and standardize its methods and procedures, moving gradually towards a perception of the task that goes beyond the mere observation or supervision of the electoral process and gives priority to the establishment or strengthening of democratic institutions.

43. Accordingly, the United Nations has set up a series of programmes designed to promote democracy and democratization. Essentially these are directed at four areas of action: (a) cooperation that is designed to create a democratic mentality and directed at all members of society, whether government officials, political leaders, parliamentarians, the judiciary, the police, members of the armed forces or the population as a whole; (b) electoral assistance, aimed at assisting national efforts to conduct free elections and ensure that these elections give rise to legitimate governments; (c) institutional support for the creation or strengthening of the rule of law, which involves a wide variety of activities aimed at the reform and strengthening of legal and judicial systems; the institutionalization of constitutional bodies for the protection of human rights; the creation of police forces and armed forces that respect human rights and the rule of law; and, lastly, (d) support for the creation or strengthening of social institutions or processes that form part of democratic life, such as the promotion of independent trade unions or participation by women in political and social life.

44. These programmes conducted by the Office of the Secretary-General are supplemented by the democracy-related components of the peacekeeping missions authorized by the Security Council and by the programmes for the promotion of democracy and the strengthening of the rule of law carried out by the office of the United Nations High Commissioner for Human Rights and the specialized agencies.

45. The United Nations also has a programme to support efforts by Governments to promote and strengthen new or restored democracies. The General Assembly, in its resolution 51/31, supported the initiatives of the Secretary-General in this respect and requested him to submit a report "including innovative ways and means as well as other reflections, to enable the Organization to respond effectively and in an integrated manner to requests of Member States for assistance in the field of democratization".[15]

46. The United Nations maintains ongoing cooperation with the new or restored democracies and conducts a specific programme of assistance in coordination with UNDP.[16]

B. Protective norms and mechanisms for the promotion and protection of democracy in the Americas

47. The legal interdependence between democracy and human rights was established at an early stage in the American continent. The American Declaration of the Rights and Duties of Man, approved in 1948 some months prior to the Universal Declaration of Human Rights,

recognized that the inter-American system of protection consisted of the functional combination of the provisions protecting human rights contained in the American Declaration itself and "the guarantees given by the internal regimes of the states".[17] The nature of this political regime was defined by the charter of the Organization of American States, which proclaimed that one of its purposes was to promote and consolidate representative democracy, with due respect for the principle of non-intervention.

48. These basic provisions, which were aimed at further development of standards, received only limited and ambivalent application within the context of the cold war. The confrontational strategies of the democratic, revolutionary and nationalist forces, and those opposed to the status quo in general, committed the OAS to policies that lent impetus to the ideological struggle. In many cases normative commitments to encourage democracy, respect human rights and respect the principle of non-intervention were left aside. Throughout much of the cold war, while the world was divided into ideological blocs, the principles concerning the promotion of democracy and respect for human rights were overwhelmed by widespread instances of intervention, the overthrow of democratically elected Governments, the establishment of military dictatorships and the massive and systematic violation of human rights.[18]

49. From the late 1980s onwards constitutional governments gained ground in the Americas and military regimes gradually disappeared. In the early 1990s, coinciding with the end of the bipolar tension and the transition to a new international system, democratic regimes spread across the region. The conditions were created for resuming the legislative initiatives on democracy that had been interrupted in the 1940s. Today the OAS has a relatively advanced system for the promotion and protection of democracy. As far as norms are concerned, the OAS Charter now in force establishes that "the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy".[19] Within the inter-American system, therefore, democracy has now become a prerequisite for membership of the OAS. Some authors invest it with the legal status of an international obligation.[20] The normative mechanisms for promoting and safeguarding democracy are evolving rapidly in accordance with a practice which has always been ambivalent. These mechanisms vary in their nature, scope and efficacy.

50. Declarative action is normally a means of exerting influence and diplomatic pressure. It is applied through formal pronouncements by the governing bodies of the OAS regarding the situation of democracy in the country concerned. In circumstances justified by threats to democracy or deterioration in the democratic institutional process, the Secretary-General of the Organization is empowered to undertake information and evaluation missions. In the event of occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the member States, the Secretary-General of the Organization may initiate a procedure culminating in an ad hoc meeting of the ministers of foreign affairs and the adoption of measures aimed at re-establishing the democratic institutional process. Since this is a mechanism of urgent action it must be completed within a period of 10 days.

51. The sanctions were authorized by the Protocol of Washington, which introduced substantial amendments to the OAS Charter. They are applied solely in the event of the illegitimate access to power of a government that overthrows a democratically constituted

government. In such a case, and only after the failure of diplomatic initiatives to re-establish the democratic order, the member State is suspended in the exercise of its right to participate in all the organs of the system.

52. In practice, no sanctions have been applied up to now, while OAS resolution 1080 has been applied in the cases of Haiti (1991), Peru (1992), Guatemala (1993) and Paraguay (1996). The results have been ambiguous. While in the cases of Haiti and Guatemala collective action was effectively designed to re-establish the impaired democratic order, in the case of Peru it amounted to the legalization of a "government coup" that dissolved Congress and gradually abolished the separation of powers, through the international recognition of the creation of a new parliament suited to the needs of a non-democratic government.[21]

53. The Peruvian crisis brought about by the wish of President Alberto Fujimori to be re-elected for a third term once again tested the mechanisms of the inter-American system. In this case resolution 1080 was not applied but, on the basis of the general principles contained in the Charter, a special commission was appointed to contribute to the internal dialogue and facilitate a democratic outcome to the crisis. Finally the OAS, following a series of vacillations, was able to take action on two fronts with favourable results. First of all, it promoted a dialogue between the Government and the opposition which was pressing for democratization; and secondly, it sent an electoral observation mission which became actively involved and helped to prevent any obvious attempt at fraud.

54. On the basis of the Peruvian experience, the OAS initiated a process to standardize and strengthen its mechanisms for the promotion and protection of democracy. At the initiative of Peru, the ministers of foreign affairs, acting on behalf of the heads of State and Government, are due to approve an Inter-American Democratic Charter in September 2001. The basic text of this Charter recognizes the right of the peoples of the Americas to democracy and extends the possibility of applying sanctions to cases in which, without a democratic Government being overthrown, there is evidence of severe impairment of the democratic system.[22]

55. This "democracy clause" was adopted in the context of the so-called Summit of the Americas process, which refers to the periodic meetings of the Heads of State and Government of the Americas, together with all the programmes and initiatives arising out of that process, including the creation of a free trade area for the Americas by the year 2005. At the latest meeting of the Heads of State of the Americas, held in Quebec on 21 and 22 March 2001, a democracy clause was adopted stating that the unconstitutional alteration or interruption of the democratic order in any of the countries would lead to the suspension of the country concerned from the Summit process.

56. An initial consequence of this agreement was the adoption at the thirty-first session of the OAS General Assembly of a resolution encouraging the Inter-American Development Bank to apply the democracy clause adopted as part of the Summit process. The application of the democracy clause by the IDB amounts to the establishment of an economic sanction procedure.

57. The recognition of democracy as a value that is related to the enjoyment of human rights and fundamental freedoms, which should be placed under international responsibility in the Americas, is not confined to the inter-American sphere. At the same time, various bodies

responsible for integration agreements or mechanisms for concerted political action and coordination have adopted democracy clauses by means of resolutions or treaty instruments. To varying degrees these clauses introduce the sanction of suspension of participation rights for Governments that attack the democratic system. Democracy clauses of this kind have been adopted by the Andean Community, Mercosur, the Rio Group and the Central American Integration System.[23]

58. These normative developments, which establish collective responses to the possibility of interruption or alteration of the democratic order, in some cases have a political connotation and in other cases are of a legal nature. Thus a normative process is taking place in the Americas that is directed towards the recognition of democracy as an obligation and a duty and the recognition of the impairment of the democratic system as an act that may entail international responsibility.

C. Protective norms and mechanisms for the promotion and protection of democracy in Africa

59. In the African continent, despite the existence of many conflict situations and the impact of poverty and extreme poverty on social and national cohesion and the ravages being caused by the HIV/AIDS epidemic, the social and State forces behind the democratization process have made some very significant advances. At no time since the start of the independence process has electoral democracy been as widespread as at present. This has led to recent developments of tremendous importance in terms of the perception of democracy as a shared value and as the system of government that provides the best conditions for promoting respect for human rights, for reducing poverty and for encouraging development.

60. The African Union, which is to replace the Organization of African Unity, has acknowledged democratic institutions as a common value and a factor of political identity. The Constitutive Act of this new international organization was signed in Lomé, Togo, on 1 July 2000. The preamble to this instrument refers to the need to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law.

61. Article 3 establishes the objectives of the African Union, which include the promotion of popular participation and good governance and the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments. Article 4 sets out the principles underlying the Union, including non-interference in internal affairs and respect for democratic principles, human rights, the rule of law and good governance.

62. Article 17 establishes the Pan-African Parliament. Article 18 sets up a regional Court of Justice, while article 23 deals with the imposition of sanctions on any member State that fails to comply with the decisions and policies of the Union. The sanctions comprise, in particular, denial of transport and communications links and other measures of a political and economic nature to be determined by the Assembly of the Union. Article 30 contains a democracy clause, similar to the clauses that exist in the Americas, whereby Governments that come to power through unconstitutional means will not be allowed to participate in the activities of the Union.

D. Protective norms and mechanisms for promotion and protection of democracy in the Commonwealth

63. The 54 member States of the Commonwealth have also undertaken the twofold commitment to adopt standards to protect democracy as the system of government permitting the fulfilment of human rights and to set up mechanisms of collective action for the promotion and protection of democracy. These developments have been made possible, as the Secretary-General of the Commonwealth testifies, because "a resurgence of popular aspirations for democracy and fundamental freedoms has been taking place, with coups d'états and military regimes falling into disfavour and many States moving from one-party rule to multi-party democracy. Non-governmental organizations and community groups have become increasingly active in articulating human rights concerns and campaigning for basic human rights, not only for victims of human rights abuses but also for politically and economically disadvantaged groups".[24]

64. The Harare Declaration (1991) contains a definite commitment to human rights and democracy. Among the principles guiding community action it includes support for democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government.[25]

65. The Declaration also reaffirms the commitment of member countries to the principles of the liberty of the individual under the law, equal rights for all citizens regardless of gender, race, colour, creed or political belief, and the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.

66. In 1995 the Commonwealth countries approved the Millbrook Action Programme in order to put into practice the principles adopted in Harare concerning the promotion and protection of democracy and human rights. An action group made up of ministers of foreign affairs was set up as a mechanism for dealing with and coordinating collective responses to serious and persistent violations of these principles.

67. Ways and means are also available for providing various forms of cooperation and technical assistance to deal with electoral and constitutional problems, to strengthen the rule of law and the judiciary, to improve governance, to send out electoral observation missions, and to strengthen democratic culture and parliamentary practices.

68. In the event of a clear deterioration in democratic institutions or a coup d'état affecting a democratically elected government, the Commonwealth is empowered in the first instance to adopt measures to encourage the restoration of democracy within a reasonable period, including the dispatch of a commissioner or a mission to support the mediation work of the Secretary-General. If democratic institutions are not restored and a fair and free electoral process is not instituted within a reasonable time, additional measures are taken which may lead to the suspension of the member State and of technical assistance programmes.

E. Protective norms and mechanisms for the promotion and protection of democracy in Europe

69. Under the aegis of the Council of Europe, democratic rights and freedoms were enshrined in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the subsequent protocols and in a number of other complementary instruments such as the 1961 European Social Charter (revised in 1996), the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the 1995 Framework Convention for the Protection of National Minorities. Democracy is a factor of identity and a requirement for membership of the Council and is seen as the social, institutional and political context within which the enjoyment of human rights and fundamental freedoms can be secured.

70. The Council has established a compulsory collective system to ensure respect for the principles of democracy and human rights, based on mutual cooperation and monitoring carried out through a set of political and legal monitoring procedures. Respect for intrinsic democratic values is not considered an exclusively internal matter but one that entails, on legitimate legal and political grounds, the responsibility of all member States, both individually and collectively. The Statute of the Council of Europe and its practice determine the conditions for membership of the Council. The rule of law, the existence of a pluralist democracy and the exercise of guarantees ensure the enjoyment of human rights.

71. In the event of persistent violations of human rights or non-compliance with monitoring procedures, the Council of Europe may adopt sanctions, which in extreme cases could lead to the expulsion of the State concerned. However, the purpose of the monitoring mechanisms is not to impose sanctions but to identify problems and help overcome them. The task of the Committee of Ministers is thus to examine in a constructive way the questions brought before it and to support member States through dialogue and cooperation, in order to persuade them to take appropriate measures to uphold democratic and human rights standards.

72. The European Union also identifies with democratic and human rights values. To protect the political rights of individuals living in the European Union, it has established the office of European Ombudsman, with powers to provide quasi-jurisdictional protection to those who believe that their political rights, based on the principles of democracy and the rule of law, have been impaired by an administrative act by one of the community institutions.

73. In December last year, the member countries of the European Union signed the Treaty of Nice, which, although it has not yet entered into force, contains provisions for possible European Union decisions in cases of grave violations by a member State of the principles of respect for democracy and human rights.

F. Protective norms and mechanisms for the promotion and protection of democracy within the Organization for Security and Cooperation in Europe

74. The developments that have taken place in Eastern Europe and the transition to the rule of law and democracy are among the most dynamic changes that have occurred in the process of democratization in the world. The democratic borders of Europe have expanded and,

notwithstanding the resurgence of ethnic and national conflicts, this is a trend that affects all European States. Against this background, the Organization for Security and Cooperation in Europe in its Copenhagen Declaration (1990), has established as factors of identity and requirements for membership a democratic system of government, the rule of law and the protection of human rights. Recognizing that internal tension or conflict cannot be ruled out owing to social and political changes, the Declaration places precise limits on any decision by a State to restrict human rights, in accordance with international standards and practice.

75. As has been pointed out, "the relevance of the Copenhagen Declaration, and its originality, lies in its assertion that the protection of human rights is 'one of the basic purposes of government', that freely elected governments are essential for the protection of those rights and that the States involved in the OSCE process have a responsibility to protect democratically elected governments under threat from acts of violence or terrorism".[26]

76. OSCE has an Office for Democratic Institutions and Human Rights, which is responsible for carrying out projects and programmes to strengthen the institution of democracy. It also has mechanisms to monitor situations in which the rule of law and the democratic system are harmed or jeopardized, through fact-finding missions, assessments and rapporteurs with specific mandates. The work of these mechanisms focuses on the protection and development of the ongoing processes of democratization.

G. Protective norms and mechanisms for the promotion and protection of democracy in States belonging to the French-speaking community

77. In the Bamako Declaration adopted on 3 November 2000, States belonging to the French-speaking community reaffirmed their commitment to the basic principles of democracy as a system of universal values based on the recognition of human rights and the principles and norms of the rule of law. At the same time, they undertook to strengthen the institutions that could help consolidate the rule of law, encourage the renewal and modernization of parliaments, ensure the independence of the judiciary and promote free, credible and transparent elections.

78. The Bamako Declaration also lists a number of procedures for monitoring and implementing practices favourable to democracy, human rights and fundamental freedoms. These mechanisms include monitoring and preventive action and the adoption of specific measures in cases of serious irregularities in the democratic system. If crises occur, provision is made to send a mediator or facilitator, subject to prior acceptance by the State concerned, to seek mutually agreeable solutions. In the event of a collapse or breakdown of democracy, the issue may be taken up urgently by the Standing Council, which may make a public statement, send an observer mission or mission of good offices, and, if all else fails, adopt measures such as suspending the country concerned from meetings of its bodies or suspending multilateral cooperation, with the exception of programmes that benefit the civilian population or that are conducive to the re-establishment of democracy.

IV. THE EMERGENCE OF AN INTERNATIONAL REGIME ON DEMOCRACY AND HUMAN RIGHTS: THE RIGHT TO DEMOCRACY

79. The growing number of legal and political instruments that now recognize democracy as a universal value, together with the spread of norms adopted by States to promote and protect it subject to a certain international guarantee - with the introduction of so-called "democratic clauses" entailing a degree of international responsibility in cases where there is a serious irregularity or a breakdown in the democratic system - are gradually leading to the creation of an international regime on the institution of democracy and on its promotion and protection.

80. An international regime can be defined as a set of principles, norms, rules and procedures, including coercive measures of various kinds, which govern the relationships between States and determine which kinds of behaviour are legitimate and which are to be considered dysfunctional.[27] Because of the existing interdependence between human rights and democracy, because of the normative, conceptual and instrumental links between the various international instruments governing them, and because human rights and democracy are materially and conceptually difficult to separate in practice, the emerging international regime on democracy, before asserting itself in its own right, is tending to form part of the international human rights regime.

81. Many of those writing about international human rights law are therefore beginning to consider democracy as a human right or, in the words of Hannah Arendt, as the right to have rights. The right to democracy, in this context, could be defined as the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of political parties, full respect for the exercise of the freedoms of expression, the press and association and the effective enjoyment of human rights.

82. Antonio Cancado Trindade, President of the Inter-American Court of Human Rights, referring to the move four-and-a-half decades ago to lay the groundwork for the internationalization of the protection of human rights, has recalled that "it is possible that we are today about to enter the initial phase of an equally encouraging large-scale phenomenon with far-reaching implications, the international promotion of democracy itself and the rule of law".[28]

83. The internationalization of the protection of democracy in a process linked directly to human rights is already happening, if one considers the normative protection structures already in place in Europe, the Americas and Africa, as well as developments that have occurred in recent years in the United Nations legal framework and in international relations as a whole.

V. A HOLISTIC VIEW OF THE INTERRELATIONSHIPS BETWEEN DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW COVERS ALL HUMAN RIGHTS, INCLUDING SOCIAL, ECONOMIC AND CULTURAL RIGHTS

84. The link between democracy and human rights is not limited to civil and political rights but necessarily covers economic, social and cultural rights as well as third-generation rights. Democracy does not stop with the formal structure of the rule of law or the indispensable periodic replacement of rulers following free and fair elections. The legitimacy of government vis-à-vis the governed needs to be established and constantly renewed. This implies the capacity to establish an inclusive relationship with all sectors of society, eliminating racism and all forms of xenophobia and respecting cultural and ethnic as well as regional and national diversity. Basically, however, the legitimacy of democracy as a system of government does not lie only in the State's legal norms but also in a relationship between government and the governed that is based on social cohesion and on encouraging citizens and the institutions of civil society to participate in decision-making processes.

85. Democracy and the rule of law should not only ensure compliance with the duty to guarantee the enjoyment of civil, political and human rights, but should also be able little by little to realize the economic and social rights of the population. In this context, the fight against poverty and extreme poverty, extreme social inequality and unfair income distribution is fundamental to legitimizing the exercise of power in a democratic system. From a sociological and political point of view, democracy should transfer powers, in order to allow the poor and marginalized members of society a status of citizenship, which integrates them fully in the political and economic system and makes them directly responsible actors at the national, regional and local levels in economic and social development strategies and policies.

86. From this perspective, at both the national and the international level, human rights, democracy and the right to development are interrelated, as recognized in Vienna at the World Conference on Human Rights.

VI. THE REALIZATION OF HUMAN RIGHTS AND THE QUALITY OF DEMOCRATIC INSTITUTIONS: GOVERNANCE, RESPONSIBILITY AND THE FIGHT AGAINST CORRUPTION

87. Although in the past decade democracy has made unprecedented progress and is increasingly seen as a universal value linked to the exercise and enjoyment of human rights, in many countries, especially in developing regions, its legitimacy and functioning are nevertheless in various states of crisis. This is basically because in quite a lot of cases the limited and inadequate development of civil society and the rule of law has led to a situation in which representative democracy functions in practice as a sort of "democracy by delegation", in which democratically elected Governments, once in power, lose their legitimacy, become detached from the electorate, unduly concentrate political power in the hands of a few and govern in a way that places the will of the ruler above the Constitution and the law, thus affecting the separation of powers and the functioning of the democratic political system.

88. In addition, there are other new threats to democracy, such as bad government and corruption, which contribute to the loss of legitimacy of democracy in specific situations. Corruption, in particular, is a problem that arises in all parts of the world, with serious consequences for governance and democratic legitimacy. When it becomes systematic and is associated with the exercise of political power, it pervades public institutions and establishes the kind of relationship between the citizen and the State in which the betterment of an individual or group, the illegal appropriation of State funds, the unpunished abuse of authority and the collusion of the judicial apparatus delegitimize the very foundations of the rule of law.

89. Widespread corruption, by eroding the foundations of the rule of law, also tends to seriously undermine the protection of human rights, especially in relation to the loss of autonomy in the administration of justice and the subsequent violations of due legal process. It is not exceptional for State corruption to be mirrored in limits on the right to freedom of expression and of the press and in specific violations of human rights, including the rights to personal liberty and to life.

90. Good governance, or, to be more precise, best practice in good governance, requires a State administration that is capable of preventing and combating corruption. Judicial and administrative controls are important but not enough on their own. The monitoring of governmental integrity must also involve the media and civil society.

VII. PRELIMINARY CONCLUSIONS

(1) The end of the system of power blocks, a leftover of the cold war, paved the way for the gradual adoption worldwide of the intrinsic values of democracy and the rule of law, which draw legitimacy from the universal system for the protection of human rights.

(2) Globalization, regardless of its ambivalent effects on the economic and social life of peoples, also promotes values like democracy and human rights, which increasingly enjoy international protection.

(3) The effects of this process are increasingly felt in the sphere of values and policy. Cultural and social exceptions or characteristics are not recognized as limits to the protection of human rights or to democracy. At the same time, the spread of democracy around the world does not clash with national particularities or cultural diversity, which, on the contrary, it takes as given and has a duty to promote.

(4) Since the end of the 1980s, the momentum towards democracy has received an unprecedented impetus in what is basically an internal process corresponding to the democratic aspirations and struggles of peoples.

(5) At the international level, this process is reflected in the adoption of norms and institutional structures linking democracy and the protection of human rights in a relationship of mutual dependence and incorporating the legal and political protection of democracy as an increasingly universal value. It is also reflected in the adoption of mechanisms to promote

democracy, prevent situations that might affect or threaten democratic institutions and apply various kinds of sanctions in cases where there is a serious breach or breakdown of the democratic order.

(6) This process is leading to the emergence of an international regime on democracy and human rights that is based on shared values, regulatory norms and institutions to promote and protect them, including mechanisms for collective action agreed upon by States freely exercising their national sovereignty.

(7) The international protection of democracy and its increasing regulation as an international obligation in various regional and subregional forums for inter-State cooperation, as well as the granting to individuals and peoples of subjective powers to demand a democratic form of government or the enforceability of their political rights, are spurring legal writers to affirm an emerging right to democracy.

(8) Independently of the legitimacy of democracy and the rule of law as part of the State framework for realizing human rights, and of their gradual dissemination worldwide, democratic systems of government are faced in many countries with problems related to their functioning, representativeness and legitimacy.

(9) These problems are related to the lack or weakness of mechanisms for dialogue and participation that would enable civil society and the people at large - especially the poorest and most marginalized in society - to have more of a say in policy decisions and in the authorities' actions and monitoring procedures.

(10) The persistence of poverty and critical levels of poverty, the exclusion and marginalization of large sectors of the population and the lack of development opportunities are also serious situations and a potential source of conflict that militate against good governance and democratic stability.

(11) Corruption, especially when it becomes systematic and affects government institutions, is a serious threat not only to democracy but also to the rule of law itself, because of its implications for impunity, and may result in the loss of legitimacy of the system.

(12) Beyond the norms and institutional mechanisms adopted in the international arena to promote, consolidate or protect the institution of democracy, it is essential that international action should adopt a holistic approach and should recognize the links between democracy, human rights, the rule of law, good governance and the integrity of the public authorities, and structural supports for democracy, such as the fight against poverty and extreme poverty, development, social cohesion, inclusive social policies and the integration of women in the political process and productive activities.

Notes

[1] See Commission on Human Rights resolution 1999/57 on Promotion of the Right to Democracy, E/CN.4/1999/167 and Add.1.

[2] Manuel Aragón Reyes, "Estado y Democracia" (State and democracy) in El derecho público en finales de siglo, Madrid, Eduardo García de Enterría and Manuel Clavero Arévalo, 1997, p. 43.

[3] Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, arts. 7-11.

[4] Ibid., art. 21, para. 3.

[5] International Covenant on Civil and Political Rights, General Assembly resolution 2000/200 A (XXI) of 16 December 1966, art. 25.

[6] See Inter-American Court of Human Rights, The word "laws" in article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of 9 May 1986. Series A: Judgements and Opinions No. 6, paras. 30 and 31.

[7] See Inter-American Court.

[8] Charter of the Organization of American States, OAS, Washington, 1998.

[9] American Declaration on the Rights and Duties of Man, 1948.

[10] A 51/761, para. 27.

[11] Of the 11 territories subject to the international trusteeship system, Togoland, Tanganyika, Cameroons, Ruanda-Urundi, Western Samoa, Nauru and New Guinea achieved independence or self-government by democratic means.

[12] Jean-Pierre Cot and Alain Pellet, La Charte des Nations Unies, Paris, Economica-Bruylant, 1985, p. 1114.

[13] Report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections, dated 19 November 1991, A/46/609, para. 32.

[14] Report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections, A/52/474, para. 3.

[15] A/52/513 of 21 October 1997.

[16] See A/52/18 of 2 March 1998, A/51/31 of 20 January 1997, A/50/133 of 16 February 1996 and A/49/30 of 22 December 1994.

[17] American Declaration of the Rights and Duties of Man, 1948.

[18] Manuel Rodriguez Cuadros, "La evolución de las relaciones interamericanas"; in Política Internacional, Lima, CEPEI, 1998.

[19] Article 3 of the OAS Charter, as amended by the Protocol of Washington of 14 December 1992.

[20] Eduardo Vio Grossi, "La democracia representativa: obligación jurídica interamericana"; in La democracia en el sistema interamericano, Washington, OAS, 1998.

[21] Arlene B. Tickner, compiler, Sistema interamericano y democracia, Washington, 2000.

[22] Organization of American States, resolution of San José, Costa Rica, Inter-American Democratic Charter, OEA/SER.P.AG/Res.1838 (XXXI-0/01), 5 June 2001.

[23] The democracy clause was established in the Andean Community by the commitment of the Andean Community for Democracy, Lima, 10 June 2000; in Mercosur by the Ushuaia Protocol on democratic commitment; and in the Rio Group through the Declaration on the defence of democracy approved in Asunción on 4 August 1997.

[24] Letter dated 23 April 1993 from the Commonwealth Secretary-General addressed to the Assistant Secretary-General for Human Rights (A/CONF.157/PC/89), para. 4.

[25] Harare Declaration, Harare, 1991.

[26] Antonio Cancado Trindade, "Democracia y derechos humanos: el régimen emergente de la promoción internacional de la democracia y del estado de derecho", in La Corte y el Sistema Interamericano de Derechos Humanos. San José de Costa Rica, CIDH, 1994, p. 524.

[27] Stephen D. Krasner, ed., International Regimes. Cornell University Press, 1993.

[28] Antonio Cancado Trindade, op. cit.

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Note by the secretariat

1. At its fiftieth session, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 1998/8, decided to establish, for a three-year period, a sessional working group, composed of five of its members, to examine the working methods and activities of transnational corporations.

2. At its second session, held during the fifty-second session of the Sub-Commission, the working group had before it for discussion three working papers submitted by Mr. David Weissbrodt: "Principles relating to human rights conduct of companies" (E/CN.4/Sub.2/2000/WG.2/WP.1) and its two addenda containing background information and a list of existing sources of international standards drawn on in the preparation of the draft principles (E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 and Add.2). In its recommendations for future work, the working group, inter alia, invited Mr. Weissbrodt to revise and update his draft standards on the human rights conduct of companies, in the light of the need for more detail on ways to implement them, and to submit his revised working paper to the sessional working group and the Sub-Commission at their next sessions (see the report of the sessional working group on the working methods and activities of transnational corporations on its second session (E/CN.4/Sub.2/2000/12), paras. 10 and 61).

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3. In this regard, the secretariat received the following four working papers prepared by Mr. Weissbrodt which will be issued as documents of the working group at its third session, to be held during the fifty-third session of the Sub-Commission:

(a) Introduction to the draft universal human rights guidelines for companies (E/CN.4/Sub.2/2001/WG.2/WP.1);

(b) Draft universal human rights guidelines for companies (E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1);

(c) Background paper on source materials for the draft universal human rights guidelines for companies (E/CN.4/Sub.2/2001/WG.2/WP.1/Add.2); and

(d) Report of the seminar to discuss the draft United Nations human rights guidelines for companies (E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3).

4. Pursuant to the recommendation of the working group, the above four working papers will also be made available to the Sub-Commission as background documents under item 4 of its provisional agenda.

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Note verbale dated 19 June 2001 from the Permanent Mission of Iraq to the United Nations Office at Geneva addressed to the United Nations High Commissioner for Human Rights

The Permanent Mission of the Republic of Iraq to the United Nations Office in Geneva presents its compliments to the United Nations High Commissioner for Human Rights and has the honour to transmit, attached, a note on the system of Smart Sanctions,* submitted by the Republic of Iraq to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-third session.

The Permanent Mission of the Republic of Iraq would be grateful if the United Nations High Commissioner for Human Rights would take the necessary measures to distribute this note as a document of the fifty-third session of the Sub-Commission under the item of the provisional agenda entitled: "Economic, social and cultural rights".

* The annex is reproduced as received, in Arabic and English only.

Annex

Note concerning the sanctions regime imposed on Iraq and the so-called "smart sanctions", submitted by the Government of the Republic of Iraq to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-third session under item 4 of the provisional agenda entitled "Economic, social and cultural rights"

In the light of Sub-Commission on Human Rights resolution 2000/25 entitled "Adverse consequences of economic sanctions" in which it decides to continue its examination of sanctions regimes at its fifty-third session under item 4 of the provisional agenda entitled "Economic, social and cultural rights", the Government of the Republic of Iraq would like to point out that the economic sanctions regime imposed on Iraq was based on Security Council resolution 661 (1990) and on two other resolutions, namely 665 (1990) and 670 (1990). The sanctions against Iraq are the most comprehensive in the history of the United Nations, particularly since they are in fact intended to isolate Iraq and its 23 million people from the outside world.

It is now clear that the war of aggression waged against Iraq in 1991 was targeted at the Iraqi infrastructure in order to compound the economic destruction and psychological ruin of the Iraqi people and push Iraq back into the pre-industrial age, as expressly stated by the former United States Secretary of State, James Baker, in 1990.

Following the end of the war in February 1991, the Iraqi people faced a terrible crisis of survival owing to the destruction of power plants, water purification facilities, food depots, sewage treatment plants, oil wells, hospitals and other targets.

The effects of the economic embargo extended to include all aspects of life and delayed progress and the process of cultural revival in Iraq. Today, the Iraqi people are facing destruction and genocide by a weapon that is no less dangerous than weapons of mass destruction, namely that of the economic embargo.

The current situation in Iraq demonstrates that malnutrition and the spread of disease are firmly linked to mortality among the under-fives. An increase in the diseases of malnutrition has been widely noted and such diseases are one of the serious problems from which the children in Iraq suffer. Statistics also show that the incidence of malnutrition has increased sharply, having risen from 18.7 per cent in 1991 to 26.7 per cent in 1998.

Statistical information further indicates that infant and child mortality rates have been similarly affected; since imposition of the embargo in 1990, a total of 622,887 children under the age of five have so far died as a result of diarrhoea, pulmonary and respiratory diseases and malnutrition. Among the over-fives and the elderly, a further 897,530 people have died from cardiac disease, hypertension, diabetes and malignant tumours.

In the field of education, the total enrolment rate in child nurseries in Iraq fell from 8.2 per cent in 1991 to 3.7 per cent in 2000, and although primary education has been

compulsory in Iraq since 1978, a proportion of children between the ages of 6 and 11 remain outside the system, parents being forced by the need to earn sufficient income to postpone the day when their children start school.

The 1998 report of the Minister of Education shows that, during the period 1990-1998, approximately 22.6 per cent of children were not enrolled in school. In 2000, 82.5 per cent of males were enrolled in primary schools, compared with 69 per cent of females. Overall enrolment among children of primary school age fell from 92.3 per cent in 1990 to 86.3 per cent in 2000.

The oil-for-food programme

It might initially appear to some that the Security Council has not disregarded the negative impact of the continuing embargo against Iraq, in which connection they refer to the establishment of the humanitarian programme adopted pursuant to Security Council resolution 986 (1995). At least that is the position of United States and United Kingdom officials.

In this regard, it should be stated that the United Nations oil-for-food programme has been prevented from attaining its humanitarian objectives for a variety of reasons, including the complexity of the measures adopted by the Security Council for implementation of the Memorandum of Understanding and interference by the United States of America and the United Kingdom in its implementation. Unfairness has also been seen in the distribution of revenues from the sale of Iraqi oil, added to which have been the persistence of the United States of America and the United Kingdom in placing contracts on hold on imaginary pretexts, the bureaucracy in the way that contracts are submitted, an accumulation of the monies allocated for United Nations operational and administrative costs, the removal of vast sums for the reparations fund and inadequate financial management, as revealed in the report of the Secretary-General on the Office of Internal Oversight Services (A/55/436) in the section entitled "Office of the Iraq Programme".

In scores of letters addressed to the Secretary-General of the United Nations and in contacts with the United Nations Humanitarian Coordinator in Iraq and the Office of the Iraq Programme in New York, the Government of Iraq has endeavoured to reveal the facts which it has discovered in its experience with the so-called humanitarian programme, which it expected to put an end to the deterioration in the living conditions of inhabitants under the unjust embargo. No serious moves, however, have so far been made to remedy these discrepancies.

The shortcomings which have been diagnosed cannot possibly create an effective system that would satisfy the humanitarian needs of the Iraqi people. In this connection, we should like to recall the opinion firmly expressed by the second of the panels established by the Security Council under the chairmanship of Ambassador Celso Amorim to examine the humanitarian situation in Iraq in 1999, which, in paragraph 58, Annex II of document S/1999/356, stated that "the humanitarian situation in Iraq will continue to be a dire one in the absence of a sustained revival of the Iraqi economy, which in turn cannot be achieved solely through remedial humanitarian efforts". This clearly means that the cure is the lifting of the embargo.

Security Council resolution 1284 (1999) and the draft resolution on so-called "smart sanctions"

Following the end of the activities of the panels chaired by Ambassador Amorim and the debate on their reports, the United Kingdom, with clear United States support, made strong efforts to submit a new resolution, a process which took several months. As a result, Security Council resolution 1284 (1999) was adopted on 17 December 1999 and on 19 December 1999, Iraq declared that it would not deal with that resolution because it did not respond to Iraq's legitimate call for the lifting of the embargo and it made no mention whatsoever of the aggression against Iraq and the daily breach of its sovereignty by the imposition of the aerial exclusion zones by the United States of America and the United Kingdom. Iraq stated at the time that the objectives of the United States of America and the United Kingdom in the resolution was to mislead international public opinion, because the concept of "suspension" contained in the resolution was new - a concept that required a long and complicated series of new and unclear conditions that could have been interpreted in so many ways that the resolution had no guarantee that the suspension would in fact take place. Furthermore, the time scales mentioned in the resolution were artificially long and were laid down to suit the domestic situation in the United States of America in an election year. They also showed the intention of the United States of America and the United Kingdom to perpetuate the illegal aerial exclusion zones over northern and southern Iraq, as well as the acts of military aggression against Iraq, the illegitimate United States intervention in Iraq's internal affairs and its overt attempts to change the national political system in Iraq. Iraq further made it clear that, in both substance and form, the resolution was an illegal redrafting of Security Council resolution 687 (1991). Iraq also made clear that the stringent and vague conditions surrounding the new and illusory concept of "suspension" were fresh conditions that were not stipulated in previous resolutions. They were placed there in order to ensure that any suspension, if ever it were to take place, would have no substance or benefit for Iraq and would also constitute an arbitrary restriction of Iraq's sovereignty over its economy and resources.

Although the situation remained unchanged, the international campaign to lift the sanctions on Iraq and to end the crime of genocide being perpetrated against the people of Iraq continued and escalated. With the coming to power of the new United States Administration at the beginning of this year, United States officials began to state that the embargo imposed on Iraq was "faltering" and resembled "Swiss cheese". They also stated that one of the major concerns of the new Administration was to "revitalize" the sanctions against Iraq. This concept of revitalization began to take form shortly thereafter, when the United States of America and the United Kingdom submitted a draft resolution to the Security Council on the so-called "smart sanctions", which were claimed to be a lessening of sanctions on people and a strengthening of sanctions on the Iraqi Government. We should not forget that the new United States Administration opened its file on dealing with Iraq with an act of aggression on the night of 16 February 2001.

Reasons for rejection of the draft resolution on so-called "smart sanctions"

The Government of Iraq rejected the draft resolution on so-called "smart sanctions", the reasons for which can be summarized as follows:

1. The draft resolution replaces the current system for the approval of humanitarian food contracts that is based essentially on allowing all civilian items to enter Iraq, excluding the dual-use items annexed to Security Council resolution 1051 (1996), which are items with civilian uses that can also be used to build weapons of mass destruction. Contracts for such items are not approved until Iraq agrees to the plan for ongoing monitoring and verification (suspended since 16 December 1998). Iraq submitted no contracts for the import of items in this category during the last nine phases. The proposed new system increases the list of dual-use goods to include all military items and the dual-use items contained in the Wassenaar Arrangement Dual-Use and Munitions List, which are unrelated to weapons of mass destruction, as well as other civilian items, including:

- Training, cargo and civil aircraft, aircraft engines, aircraft spare parts and aircraft components;
- Airborne navigation equipment and airborne radar equipment;
- Explosive detection systems, including those used in airports;
- Communications equipment, including civilian items such as optical fibre cables for use in public telephone exchanges, wireless equipment and digital processing equipment;
- Information security and encryption equipment;
- Mining and drilling equipment;
- Oil well pipes;
- Laboratory equipment;
- Magnetic recorders;
- Trailers and loaders with a carrying capacity greater than 30 metric tonnes;
- Computer hardware and software.

There is insufficient scope here to cite many examples of the nature of the items which, under the resolution, are regarded as dual-use items. By examining the lists, however, it can be said that performance and activity in the sectors of industry, agriculture, higher education, scientific research, transport, communications and petroleum would be very adversely affected and could cease altogether with the passage of time.

The new regime authorizes the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) to review any contract which is submitted and determine whether it relates to dual-use items. If so, it forwards the contract to the Security Council Committee established by resolution 661 (1990) for a decision in that connection. Under the new regime, the list of prohibited items is therefore expanded and UNMOVIC plays the role previously

performed by the Committee established under resolution 661 (1990) of reviewing civilian contracts. The United States of America thus absolves itself from responsibility for placing contracts on hold on the pretext of dual use by shifting that responsibility onto UNMOVIC. The regime also creates a new mechanism for monitoring the supply of (conventional) military equipment to Iraq, whereas under Security Council resolutions 687 (1990) and 700 (1991) it is States which are responsible for preventing the export of arms and related materiel to Iraq. The quarterly reports of the Secretary-General on the implementation of this embargo do not indicate that any violations have occurred since it was first imposed in 1991.

2. All forms of commercial transaction between Iraq and its neighbours are subject to a regime, monitored by the United Nations, under which Iraq is not permitted to obtain any hard currency. The two proposals for this regime represent a choice between a trade-off whereby Iraq exports oil against which it imports nothing other than humanitarian items and a process whereby Iraq exports oil and places the funds in an escrow account in neighbouring States from which it then purchases humanitarian items, under United Nations supervision, by means of disbursements from that account. This regime operates hand in hand with the positioning of United Nations personnel at border points for the purpose of monitoring trading activities between Iraq and its neighbours. The cost of the United Nations personnel is also covered by the escrow account.

This proposed new regime comprises elements of interference that undermine not only the sovereignty of Iraq but also that of its neighbouring countries, which must agree to open a United Nations account for the deposit of monies paid for imported Iraqi oil. They must also agree to the presence of United Nations inspectors on their territory for the purpose of monitoring trade between them and Iraq. In addition, this regime imposes a ceiling on the volume of oil which neighbouring States are entitled to import from Iraq (150,000 barrels per day). Moreover, it abolishes the earlier procedure approved by the United Nations under which Jordan was excluded from the comprehensive sanction measures imposed on Iraq and permitted to import oil against the export of Jordanian civilian goods.

3. The draft resolution proposes a system for compensating neighbouring States for losses incurred as a result of their application of the comprehensive sanctions imposed against Iraq under Security Council resolution 661 (1990), a procedure which is inconsistent with the spirit of international law, with the prevailing interpretation of Article 50 of the Charter of the United Nations and with Security Council resolution 699 (1990) relating to requests from States for assistance pursuant to Article 50 of the Charter. The general understanding is that the United Nations and its agencies, international financial institutions and States benefiting from the imposition of sanctions either compensate third States which are injured by losses incurred as a result of their compliance with the sanctions regime or exclude them from carrying out the embargo, as in the case of Jordan. It is also understood that States which are victims of sanctions against them and which suffer fundamental damage as a result of the imposition of sanctions should not be asked to compensate third States which suffer partial damage owing to the imposition of those sanctions.

4. The draft resolution proposes a formula for the inspection of civil aircraft in neighbouring States prior to their arrival in Iraq and that Iraq should bear the costs of such inspection. This formula contravenes Security Council resolution 670 (1990), specifically in

regard to passenger flights. Even the Legal Counsel of the United Nations does not support the view that the prior approval and inspection of passenger flights to Iraq are a requirement under resolution 670 (1990).

5. The proposed draft resolution abolishes the distribution plan submitted by the Government of Iraq, as well as the procedures established in the Memorandum of Understanding and most of those under Security Council resolution 986 (1995), including extension of the 180-day operation period for each phase of the oil-for-food programme (for which a period of 190 days is proposed). It also lends permanence to the programme and turns it into a substitute for lifting of the sanctions against Iraq.

6. The draft resolution places new restrictions on companies wishing to import oil from Iraq and seeks new criteria for the selection of such companies in accordance with which the Secretary-General will choose the companies nominated.

Conclusions

Regardless of the source, the Government of Iraq categorically rejects any formula for so-called "smart sanctions" and will maintain a firm position about which there is no illusion. We do not believe that any State or authority or sane person can expect another State to participate in a project which has the ultimate objective of ending its existence as a sovereign entity. The plan of the United States of America and the United Kingdom, the French ideas and proposals and any attendant concepts will entail a full expropriation of the fate of the Iraqi State and people in all fields – politics, economics, development, trade, industry, finance and society. Iraq's rejection of such plans and their ultimate objectives therefore rises to the level of a "struggle for national independence", whatever the sacrifices involved. The so-called "smart sanctions" are but a new facet of neo-colonialism. The Government of Iraq refuses to see its people transformed into a mere consumer society – a society that eats but does not think, that enjoys but does not produce – and for whom? For foreigners.

From the very beginning, the Security Council has dealt with the Iraqi people in an unfair manner with respect to food, medicine and some civilian humanitarian requirements. Under the unjust embargo regime and the oil-for-food programme, no allowance is made for the mind, for culture, for information, for the fabric of society, for industrial, agricultural and scientific advancement – for what is needed to run a State. The reason behind this deliberate denial is not difficult to comprehend. From the outset, the goal of imposing and perpetuating such a harsh and unjust embargo against Iraq was political. Simply put, the goal was to change the national political regime in Iraq. This goal is not the shared objective of the members of the international community as represented in the United Nations. It is the goal of the United States of America and the United Kingdom and those who follow them in their own interests and who are influenced by the oil colonial mindset. Those who shift the blame onto the national Government of Iraq must remember that this regime is the very same one that brought to Iraq the highest level of development ever, as acknowledged by the international organizations concerned. They must also recognize that what they refer to as "the faltering of the sanctions regime" represents in reality a concrete reflection of the lack of conviction among the absolute majority of the international community. What is being done to Iraq does not represent their shared objective. We are confident that the old imperialist and colonial schemes to contain the situation are bound

to fail. It is no secret that the issue as a whole had nothing to do with the implementation of Security Council resolutions. It is not that Iraq continues to be a threat to its neighbours or that the problem stems from the policies and practices of the Government of Iraq.

The powers and functions of the Security Council under the Charter are clear and are fully explained in jurisprudential and judicial references. International legality, as represented by Security Council resolutions on many issues, has become the subject of ludicrous comment in many of those references, which talk about the appropriation of international legitimacy by the United States of America and the privatization of the Security Council by the arrogance of power.

What is required now, therefore, is to rectify the dangerous situation affecting Iraq so that Iraq can indeed feel that the Security Council is dealing with it in a just, balanced and even-handed fashion instead of calling on it to carry out what those who have a hidden agenda against Iraq regard as its duties. The siege imposed against Iraq must be lifted and the grievances of Iraq must be addressed fairly. These elements represent the basic foundation for security, peace and stability in the region.